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OFFICIAL EDITION

REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

JEROME B. FISHER, REPORTER.

VOLUME CXLIX.

1912.

J. B. LYON COMPANY,
ALBANY, N. Y.

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Volume 100 App. Div. contains a table of causes published in the Appellate Division prior to the issue of that volume.

The tables published in vol. 108 and every tenth volume from vol. 110 contain causes passed upon from the date of vol. 100 to February 4, 1911.

JEROME B. FISHER

CAUSES in which the decisions contained in the Appellate Division Reports have been passed upon by the Court of Appeals.

ALBRECHT v. ROCHESTER, SYRACUSE & EASTERN R. R.

Co..... 142 App. Div. 910
Judgment reversed and new trial granted: 205 N. Y. 230.

ASSETS REALIZATION CO. v. CLARK..... 137 App. Div. 881
Judgment affirmed: 205 N. Y. 105.

AVERY v. NEW YORK, ONTARIO & WESTERN R. CO. 142 App. Div. 919
Judgment reversed and new trial ordered: 205 N. Y. 502.

BANKERS SURETY CO. v. MEYER..... 146 App. Div. 867
Order affirmed: 205 N. Y. 219.

BENEVOLENT & PROTECTIVE ORDER OF ELKS v.

IMPROVED BENEVOLENT & PROTECTIVE ORDER OF
ELKS OF THE WORLD..... 136 App. Div. 896
Judgment modified and as modified affirmed: 205 N. Y. 459.

BRADSHAW v. MUTUAL LIFE INS. CO. 140 App. Div. 917
Judgment modified and as modified affirmed: 205 N. Y. 467.

BRISBANE v. PENNSYLVANIA R. R. CO. 141 App. Div. 368
*Order of Appellate Division reversed and judgment of Special Term
affirmed:* 205 N. Y. 481.

DAVIS v. TREMAIN..... 145 App. Div. 902
Judgments reversed: 205 N. Y. 286.

DOWNEY v. FINUCANE..... 146 App. Div. 209
Judgment affirmed: 205 N. Y. 251.

DUNN v. CITY OF NEW YORK..... 141 App. Div. 280
Judgment reversed and new trial ordered: 205 N. Y. 342.

EASTMAN v. HORNE..... 141 App. Div. 12
Judgment affirmed: 205 N. Y. 486.

FARRELL v. FARRELL..... 142 App. Div. 605
Judgment reversed and new trial ordered: 205 N. Y. 450.

FARRELL v. TOWN OF NORTH SALEM..... 139 App. Div. 164
Judgment reversed and new trial granted: 205 N. Y. 458.

FAURIE v. LAZELLE..... 141 App. Div. 931
Judgment reversed: 205 N. Y. 526.

FLANSBURG v. TOWN OF ELBRIDGE..... 145 App. Div. 908
Judgment reversed and new trial granted: 205 N. Y. 428.

GRIFF v. BUFFALO, LOCKPORT & ROCHESTER R. CO. 145 App. Div. 910
Judgment reversed and new trial ordered: 205 N. Y. 289.

GRIMSHAW v. LAKE SHORE & MICHIGAN SOUTHERN R.
Co..... 140 App. Div. 687

Judgment affirmed: 205 N. Y. 371.

GRISWOLD v. HART..... 142 App. Div. 106
*Order affirmed and judgment absolute given against the appellant on
the stipulation:* 205 N. Y. 384.

CAUSES PASSED UPON

HARDIE v. BOLAND Co.	.....	147 App. Div. 926 <i>Judgment reversed and new trial granted:</i> 205 N. Y. 886.
HART v. NEW YORK CENTRAL & H. R. R. Co.	.....	146 App. Div. 885 <i>Judgment affirmed:</i> 205 N. Y. 817.
HEISER v. CINCINNATI ABATTOIR CO.	.....	144 App. Div. 932 <i>Judgment reversed and new trial granted:</i> 205 N. Y. 879.
HEMMERICH v. UNION DIME SAVINGS INSTITUTION	....	144 App. Div. 418 <i>Judgment affirmed:</i> 205 N. Y. 866.
HUDSON v. DELAWARE & HUDSON Co.	.....	142 App. Div. 920 <i>Judgment affirmed:</i> 205 N. Y. 532.
JENNER v. SHOPE	.....	140 App. Div. 911 <i>Order affirmed and judgment absolute rendered against the appellant on the stipulation:</i> 205 N. Y. 66.
KENT v. JAMESTOWN STREET R. Co.	.....	146 App. Div. 902 <i>Judgment affirmed:</i> 205 N. Y. 861.
KERTSCHER & Co. v. GREEN	.....	143 App. Div. 907 <i>Judgment affirmed:</i> 205 N. Y. 522.
KIRSCHBAUM v. ESCHMANN	.....	142 App. Div. 906 <i>Judgment reversed and new trial granted:</i> 205 N. Y. 127.
LARKIN v. NASSAU ELECTRIC R. R. Co.	.....	142 App. Div. 906 <i>Judgment reversed and new trial granted:</i> 205 N. Y. 267.
LEASK v. HOAGLAND	.....	144 App. Div. 138 <i>Judgment reversed and new trial ordered:</i> 205 N. Y. 171.
LONG ISLAND R. R. Co. v. SHERWOOD	.....	147 App. Div. 895 <i>Judgment reversed and new trial ordered:</i> 205 N. Y. 1.
MANCE v. HOSSINGTON	.....	140 App. Div. 917 <i>Judgment reversed and new trial granted:</i> 205 N. Y. 83.
MATTER OF ALLEN	.....	148 App. Div. 26 <i>Order affirmed:</i> 205 N. Y. 158.
MATTER OF DUELL v. BOARD OF ELECTIONS, CITY OF NEW YORK	.....	149 App. Div. 690 <i>Order reversed:</i> 205 N. Y. 79.
MATTER OF DUNN	.....	140 App. Div. 944 <i>Order modified and as modified affirmed:</i> 205 N. Y. 898.
MATTER OF EGAN	.....	148 App. Div. 177 <i>Order affirmed:</i> 205 N. Y. 147.
MCGIBBON v. TARBOX	.....	144 App. Div. 837 <i>Judgment of Appellate Division reversed and that entered on the report of the referee affirmed:</i> 205 N. Y. 271.
MEYER v. REDMOND	.....	141 App. Div. 123 <i>Judgment affirmed:</i> 205 N. Y. 478.
MOYNAHAN v. CITY OF NEW YORK	.....	140 App. Div. 911 <i>Judgment reversed and new trial granted:</i> 205 N. Y. 194.
MOYNAHAN v. CITY OF NEW YORK	.....	140 App. Div. 911 <i>Judgment modified and as modified affirmed:</i> 205 N. Y. 181.
NEW YORK MARKET GARDENERS' ASSN. v. CITY OF NEW YORK	.....	142 App. Div. 907 <i>Judgment affirmed:</i> 205 N. Y. 532.

BY THE COURT OF APPEALS.

vii

ONTARIO KNITTING CO. v. STATE.....	147 App. Div. 816
<i>Judgment affirmed: 205 N. Y. 409.</i>	
PARSONS v. SYRACUSE, BINGHAMTON & NEW YORK R. R. CO.....	145 App. Div. 900
<i>Judgment reversed and new trial granted: 205 N. Y. 226.</i>	
PEOPLE v. BROOKLYN COOPERAGE CO.....	147 App. Div. 267
<i>Judgment affirmed on authority of former decision in this case (187 N. Y. 142): 205 N. Y. 531.</i>	
PEOPLE v. MARRIN.....	147 App. Div. 903
<i>Judgment affirmed: 205 N. Y. 275.</i>	
PEOPLE v. METROPOLITAN SURETY CO.....	148 App. Div. 512
<i>Orders affirmed: 205 N. Y. 135.</i>	
PEOPLE v. TRUST CO. OF AMERICA.....	145 App. Div. 900
<i>Judgment reversed and judgment given for defendant on demurrer: 205 N. Y. 74.</i>	
PEOPLE EX REL. BURKE v. FOX.....	150 App. Div. 114
<i>Orders affirmed: 205 N. Y. 490.</i>	
PEOPLE EX REL. HALLOCK v. HENNESSY.....	146 App. Div. 440
<i>Order reversed: 205 N. Y. 301.</i>	
PEOPLE EX REL. SIBLEY v. GRESSER.....	146 App. Div. 919
<i>Judgment affirmed: 205 N. Y. 24.</i>	
PEOPLE EX REL. STEPHENSON v. BINGHAM.....	133 App. Div. 345
<i>Order affirmed: 205 N. Y. 168.</i>	
PETERSON v. BALLANTINE & SONS.....	141 App. Div. 920
<i>Judgment reversed and new trial ordered: 205 N. Y. 29.</i>	
PETERSON v. CITY OF NEW YORK	146 App. Div. 879
<i>Judgment reversed and new trial granted: 205 N. Y. 323.</i>	
PROCTOR v. ROCKVILLE CENTRE MILLING & CON- STRUCTION CO.....	141 App. Div. 900
<i>Judgment affirmed: 205 N. Y. 508.</i>	
QUICK v. AMERICAN CAN CO.....	146 App. Div. 939
<i>Judgment reversed and new trial ordered: 205 N. Y. 330.</i>	
RIPIN v. UNITED STATES WOVEN LABEL CO.....	145 App. Div. 916
<i>Order affirmed: 205 N. Y. 442.</i>	
SALTER v. DROWNE.....	141 App. Div. 352
<i>Judgment affirmed: 205 N. Y. 204.</i>	
SEEMAN v. LEVINE.....	140 App. Div. 272
<i>Order reversed and judgment of the Municipal Court and the determination of the Appellate Term affirmed: 205 N. Y. 514.</i>	
SEITZ v. FAVERSHAM.....	141 App. Div. 903
<i>Judgments modified and as modified affirmed: 205 N. Y. 197.</i>	
SLAVIN v. MCGUIRE.....	144 App. Div. 910
<i>Judgment affirmed: 205 N. Y. 84.</i>	
SMITH v. KELLER.....	145 App. Div. 908
<i>Judgment reversed and new trial granted: 205 N. Y. 39.</i>	
SOUTHWORTH v. MORGAN.....	143 App. Div. 848
<i>Judgment reversed and new trial granted: 205 N. Y. 298.</i>	

viii CAUSES PASSED UPON BY COURT OF APPEALS.

ST. GEORGE CONTRACTING Co. v. CITY OF NEW YORK.....	148 App. Div. 554
	<i>Judgment reversed and new trial ordered: 205 N. Y. 121.</i>
TITLE GUARANTEE & TRUST Co. v. CITY OF NEW YORK.....	141 App. Div. 981
	<i>Judgment affirmed: 205 N. Y. 496.</i>
VAN BLARICUM v. LARSON.....	146 App. Div. 278
	<i>Judgment affirmed: 205 N. Y. 355.</i>
WEINHEIMER v. ROSS.....	140 App. Div. 919
	<i>Judgment reversed and new trial granted: 205 N. Y. 518.</i>
WENGERT v. IBERT BREWING Co.....	142 App. Div. 900
	<i>Judgment affirmed: 205 N. Y. 583.</i>
ZUCKER v. WHITRIDGE.....	148 App. Div. 191
	<i>Judgment reversed and new trial granted: 205 N. Y. 50.</i>

The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmation or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in or dissented from the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 181 N. Y. 490.) — [REP.]

A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME.

A.	PAGE.	PAGE.	
Abel v. National Reserve Bank.	710	Austin v. Town of Rathbone...	931
Abrahams, Matter of.....	944	Auto Press Co., Johnson v.....	948
Adler v. Mayper.....	915, 947	Automatic Vending Co., Ber-	
Adler v. Natanson.....	915	man v.....	951
Akin, Matter of, v. Custodian of		Avrutis, Matter of.....	945
Primary Records.....	950		
Allen v. Farley	944		
Altman v. Altman.....	925	B.	
Ambrose, People ex rel., v.		Baggott, Tausend v.....	944
Tomkins.....	946	Bainbridge, Fox v.....	958
American Press Assn., People		Baker, People ex rel. Bavendam	
ex rel. Britton v.....	917	v.....	958
American Railway Traffic Co.,		Baker, People ex rel. Crozier	
Schlappendorf v.....	959	v.....	957
Amsinck, Stevens v.....	290	Baker, People ex rel. Evans v...	917
Anderson v. McNulty Brothers.	735	Bank of Metropolis, People ex	
Anderson v. Poughkeepsie Light,		rel., v. Purdy (Taxes of 1901-	
Heat & Power Co.....	922	1907)	948
Andriuszis v. Philadelphia &		Barber v. Davidson..	943
Reading Coal & Iron Co.....	924	Barker, Le Baron v.....	927
Antokolitz, Cohen v.....	916	Barley, Tichnor Brothers, Inc.,	
Apgar v. Connell.....	947	v.....	871
Arbuckle, McMullen v.....	963	Barnes Mfg. Co., Ramstrom v...	959
Archer v. Archer.....	918	Barney Estate Co., Palmer &	
Arnett v. State Mutual Life		Singer Mfg. Co. v.....	136
Assurance Co.....	980	Barrett Mfg. Co. v. Sergeant....	1
Asphalt Paving & Contracting		Barrett Mfg. Co. v. Van Ronk..	194
Co. v. City of New York (No. 1).	632	Barsotti v. Del Genovese	946
Asphalt Paving & Contracting		Bartlett v. Stewart.....	943
Co. v. City of New York		Baruch v. Young.....	466
(No. 2).....	623	Bastine, St. Stephen's Church v.	943
Associated Operating Co., Leap		Batchelor v. Hinkle.....	910
v.....	859	Batchis v. Leask.....	713
Athens Hotel Co., Mellen v....	534	Bauer v. Eagle Ins. Co. of Lon-	
Auslander, Seventeenth Street		don.....	948
Realty Co. v.....	945	Bavendam, People ex rel., v.	
		Baker.....	958

TABLE OF CASES REPORTED.

PAGE.	PAGE.
Beauty Spring Water Co. v. Village of Lyons Falls	418
Beck v. Staudt	35
Becker v. McCrea	211
Becker, Mechanics Bank v.	927
Beckerman Constr. Co., Matter of Keshin, Blitstein & Co. v.	963
Beekman v. Mitchell	946
Behn, Berman v.	914
Beirne v. Ravitch	952
Bellanca, Cianciolo v.	985
Benz, Norton v.	918
Berg, Levy v.	945
Bergdorf, Matter of	529
Berkeley, Bushby v. (2 cases)	948
Berkovitz, Lipschitz v.	949
Berlinger v. Macdonald	5
Berman v. Automatic Vending Co.	951
Berman v. Behn	914
Bernhard v. Bernhard	916
Bernstein, Bryon v.	943
Bevins, People v.	935
Biehl v. Erie R. R. Co.	922, 956
Bingham v. East Massapequa Realty Co.	925
Birkett, Richmond v.	947
Bistany v. Fargo	929
Blaustein v. Blaustein	914
Blenis v. Utica Knitting Co.	936
Bloch v. Bornat	913
Bloch v. Macbeth	951
Bloom, People v.	295
Bloomingdale, Kridel v.	605
Blumberg, Matter of (No. 1)	303
Blumberg, Matter of (No. 2)	926
Board of Education of Union Free School District No. 2, Town of Trenton, v. Crill	407
Board of Supervisors of Westchester County, People ex rel. Town of Scarsdale v.	319
Boehmer v. International R. Co.	937
Bohnhoff v. Fischer	747, 956
Bohr, Deis v.	955
Bokor v. Koehler & Co., Inc.	914
Boland, Matter of	947
Bond v. Bush Terminal Company	925
Bondwin, People ex rel. v. Goldstein	914
Borgroesser v. Risch	248
Bornat, Bloch v.	913
Bornstein v. Faden	37
Borowski v. Ocean Accident & Guarantee Corp., Ltd.	993
Bosche v. Cramer	929
Bosselman, Ludewig v.	943
Boston Ins. Co., Steinberg v.	945
Bourke, Truesdell v.	928
Bowles, Witherbee v.	918
Bowne, Farmers' Loan & Trust Co. v.	945
Brady v. City of New York	816
Brady v. Eastman Kodak Co.	934
Brady & Son Co., Welch Motor Car Co. v.	945
Braker v. New York Finance Co.	943
Brand v. Glockner	946
Brettelle v. Hibbard	981
Britt, Matter of Hopper v.	94
Britt, Matter of Koenig v.	68
Brittan, Packard v.	916
Britton, People ex rel. v. American Press Assn.	917
Broadbrooks, Matter of, v. Genno	937
Broadway Brewing & Malting Co., Chilcott v.	931
Brockenshire v. Erie R. R. Co.	933
Brockway v. Syracuse Lighting Co.	937
Bronstein, Felberbaum v.	960
Bronx Bath Co., People ex rel. City of New York v.	661
Bronxville, Village of, Matter of (In re Public Service Com.)	957
Bronxville, Village of, Matter of, v. Stevens	958
Brookhaven, Trustees, etc., of, Town of, v. Port Jefferson Milling Co.	956
Brooklyn Heights R. R. Co., Follinsby v.	958
Brooklyn Heights R. R. Co., McCue v.	919
Brooklyn Heights R. R. Co., Muller v.	955
Brooklyn Heights R. R. Co., Schmitt v.	925
Brooklyn Heights R. R. Co., Schuhman v.	956

TABLE OF CASES REPORTED.

xi

PAGE.	PAGE.
Brooklyn Heights R. R. Co., Webb v.....	960
Brooklyn Majestic Theatre Co., Klein v. (No. 1).....	926
Brooklyn Union El. R. R. Co., Clyde v.....	953
Brooks v. Zuckert.....	953
Brower, Young v.....	913
Brown v. Mulvany.....	948
Brown Contracting Co. v. New York Central & H. R. R. Co.	935
Browning, Sire v.....	913, 943, 947
Bryon v. Bernstein.....	943
Bryon v. Safr.....	908
Buffalo, City of, Matter of (Grider St.).....	931
Buffalo, City of, Matter of (Trus- tees of City & County Hall)....	933
Buffalo, City of, Matter of (Water Front between Georgia & Jer- sey Sta.) Proceeding No. 2....	929
Buffalo Cold Storage Co., Smidt v.....	934
Buffalo & Lake Erie Traction Co., Miller v.....	906
Buffalo & Lake Erie Traction Co., Noonan v.....	984
Buffalo, Lockport & Rochester R. Co. v. Hoyer.....	934
Buffalo, Lockport & Rochester R. Co., Potter v.....	935
Buffalo Savings Bank, Hankow- ska v.....	929
Bugbee v. Overstreet. (3 cases).	913
Burger, Tepfer v.....	946
Burkan v. Musical Courier Co..	942
Burkelman, Reilly v.....	548
Burns, Smith v.....	255
Bursch, Connolly v.....	772
Bush Terminal Company, Bond v.....	925
Bushby v. Berkeley. (2 cases)..	948
Butler, Inc., People v.....	922
Butnors v National Sugar Re- fining Co.....	925
Butterfield, Matter of.....	948
Butts, Hinrichs v.....	236
C.	
Caboni v. Gott.....	440
Cady v. Lewis	928
Calabrese, People v.....	955
Calhoun v. Commonwealth Trust Co. of N. Y.....	914, 947
Callahan v. Greis.....	954
Callanan, Donoghue v.....	916
Camden Creamery, Smith v.....	930
Cameron, Laarson v.....	952
Campbell, Lindley v.....	935
Caporali v. Santangelo.....	911
Carey Construction Co., Matter of People ex rel., v. Smith.....	382
Carlin Construction Co., Doug- lass v.....	856
Carlin Construction Co. v. New York & Brooklyn Brewing Co.	919
Carlton v. Ryan. (2 cases).....	947
Carlson Automobile Co., Creigh- ton v.....	958
Caronoano v. Pomeranz.....	923
Carpenter, People ex rel. Hatch v.....	937
Carrier, Syracuse, Lake Shore & Northern R. R. Co. v.....	411
Carrington, Cummings v.....	936
Carroll, Symmers v.....	641
Carscallen & Cassidy v. Zimmer- man.....	944
Carthage, Village of, v. Loomis.	935
Carton, Kelley v.....	914
Casassa v. Savarese.....	243
Casey v. Davis & Furber Ma- chine Co.....	423
Cass v. Realty Securities Co.....	943
Casualty Company of America, Searcy v.....	316
Cavanagh, People ex rel., v. Waldo.....	927
Central Park, North & East River R. R. Co., City of New York v.....	944
Central Trust Co. of New York v. Gaffney.....	913
Central Trust Co. of New York v. Manhattan Trust Co.....	941
Chapman v. Read.....	52
Chelsea Exchange Bank, Ward v.....	948
Chick v. Menihan Co.....	929, 932
Chilcott v. Broadway Brewing & Malting Co.....	931
Cianciolo v. Bellanca.....	935

TABLE OF CASES REPORTED.

PAGE.	PAGE.
Cimmer v. Montgomery Brothers & Co.....	388
City of Buffalo, Matter of (Grider St.).....	931
City of Buffalo, Matter of, Trustees of City & County Hall of.....	933
City of Buffalo, Matter of (Water Front between Georgia & Jersey Sts.) Proceeding No. 2....	929
City & County Contract Co., Stehlin v.....	961
City & County Hall, Trustees of, City of Buffalo, Matter of.....	933
City of New York, Asphalt Paving & Contracting Co. v. (No. 1).....	632
City of New York, Asphalt Paving & Contracting Co. v. (No. 2).....	622
City of New York, Brady v.....	816
City of New York v. Central Park, North & East River R. R. Co.....	944
City of New York, Dady v.....	956
City of New York, Davis v.....	955
City of New York, Di Crescenti v.....	816
City of New York, Dooling v....	953
City of New York, Duffy v.....	478
City of New York, Frank v.....	947
City of New York v. Hearst....	948
City of New York, Matter of (West 151st St.).....	55
City of New York, McCarton v.....	516
City of New York, McGough v.....	959
City of New York v. Montague (No. 1).....	475
City of New York v. Montague (No. 2).....	601
City of New York, Moore v.....	955
City of New York, Murphy v....	954
City of New York, Oppenheimer v. (Chelsea Bank).....	172
City of New York, Oppenheimer v. (Security Bank).....	175
City of New York, Richards v.....	923, 954
City of New York v. Seely-Taylor Co.....	98
City of New York, Shanley v....	187
City of New York, Shute v.....	758
City of New York, Staats v.....	946
City of New York, Staten Island Water Supply Co. v.....	923
City of New York, Taber v.....	958
City of New York, Uvalde Asphalt Paving Co. v.....	491
City of New York v. Warren-Scharf Asphalt Paving Co....	633
City of New York, People ex rel., v. Bronx Bath Co.....	661
City of New York, People ex rel., v. Dickey.....	676
City of New York, People ex rel., v. Goossen.....	660
City of New York, People ex rel., v. Olssen.....	662
City of New York, People ex rel., v. Sandrock Realty Co....	651
City of Rochester, Clifford v....	932
Clarke v. Gilmore.....	445
Clarke v. Precious Metals Corporation.....	938
Claussen v. Pell & Co.....	947
Clifford v. City of Rochester....	932
Clyde v. Brooklyn Union El. R. R. Co.....	953
Coal & Iron Nat. Bank, People ex rel., v. Purdy (Taxes of 1904-1907).....	948
Cockcroft, Smith v....	255
Cocks, People ex rel. Seaman v.....	883
Coffin v. Tevis.....	942
Cohen v. Antokolitz.....	916
Cohen v. Cotheal.....	944
Cohen v. Loketz.....	951
Cohen v. New York Times Co....	956
Cohn, Kleiner v. (2 cases).....	943
Cole v. Manville.....	43
Cole, People v.....	912
Coleman v. McClenahan.....	299
Collier v. Postum Cereal Co., Ltd.....	143
Collins, Home Trust Co. of N. Y. v.....	959
Collins, Voorhees v.....	828
Colon & Co. v. East One Hundred & Eighty-ninth St. Bldg. & Const. Co.....	946
Color Photography Co. v. Donohue.....	913, 914
Commonwealth Trust Co. of N. Y., Calhoun v.....	914, 947

TABLE OF CASES REPORTED.

xiii

PAGE.	PAGE.		
Conant, Shea v.....	588	Curtis, Joyce v.....	988
Concklin v. New York Central &		Custodian of Primary Records,	
H. R. R. Co.....	739	Matter of Akin v.....	950
Concordia Fire Ins. Co. of Mil-		Custodian of Primary Records,	
waukee v. Stowell.....	930	Matter of Townsend v.....	950
Connell, Apgar v.....	947		
Connolly v. Bursch.....	773	D.	
Connors v. Long Island R. R.		D'Amato v. Silverman.....	948
Co.....	830	D'Elette v. Illinois Surety Co...	948
Connors, Luber v.....	937	Dady v. City of New York.....	956
Conroy v. Goldsmith.....	912	Daniel, Matter of.....	777
Continental Ins. Co. v Reeve...	885	Daust v. Figge.....	955
Cook Iron Store Co., Mensing v.	934	Davenport v. New York Central	
Coonan v. Hamburg-American		& H. R. R. Co.....	432
Packet Co. (No. 1).....	951	Davidson, Barber v.....	948
Coonan v. Hamburg-American		Davies v. Teplisky.....	953
Packet Co. (No. 2).....	925	Davis v. City of New York.....	955
Coonan v. Hamburg-American		Davis & Furber Machine Co.,	
Packet Co. (No. 8).....	980	Casey v.....	423
Cooper's Glue Factory, Rossiter		Dayton, Town of, Matter of	
v.....	752	Drummer v.....	981
Corn v. Heymsfeld.....	943	De Angelis, Italian Savings	
Cornish, Matter of.....	955	Bank of the City of New	
Corr, Kellum v.....	200	York v.....	916
Cotheal, Cohen v.....	944	De Coppet, Kent v.....	589
Covert, Matter of.....	932	de Cristofano v. Risolo.....	960
Cowell v. Saperston.....	873	De Pretie, People v.....	943
Cox v. Jung.....	942	Debottis v. Debottis.....	928
Cramer, Bosche v.....	929	Deering v. Pierce.....	10
Cramer, Meyer v.....	917	Deis v. Bohr.....	955
Crawford v. Washor.....	928	Del Genovese, Barsotti v.....	946
Creelman, People ex rel. Faitoute		Del Genovese v. Del Genovese..	266
v.....	943	Delaware, Lackawanna & W. R.	
Creelman, People ex rel. Smith		R. Co., Earnest v.....	330
v.....	716	Delaware, Lackawanna & W. R.	
Creighton v. Carlson Automobile Co.....	958	R. Co., Marks v.....	933
Crill, Bd. of Ed. of Union Free		Delaware, Lackawanna & W. R.	
School District No. 2, Town of		R. Co., Pennica v.....	954
Trenton, v.....	407	Delcambre v. Delcambre.....	952
Crist Company, Sterner v.....	914	Denzer, Jacobs v.....	912
Cropsey, People ex rel. Leonard		Des Jardins v. Hotchkin.....	943
v.....	730	Di Crescenti v. City of New	
Cropsey, People ex rel. Ward v.	946	York.....	818
Crosby v. Woleben.....	837, 936	Di Napoli v. Lathrop.....	956
Crotty v. Erie R. R. Co.	262	Di Stefano v. Peekskill Lighting	
Crowley v. Sun Insurance Office.	934	& Railroad Co.....	745
Crozier, People ex rel. v. Baker.	957	Diamond v. Mendelsohn.....	943
Cummings v. Carrington.....	936	Dick, Russo-Chinese Bank v....	949
Cuppy v. Stollwerck Bros.....	947	Dickerson v. Musica	960
Curran, Parsons v.....	702	Dickey, People ex rel. City of	
		New York v.....	676

PAGE.	PAGE.		
Dilluvio v. New York & Queens Co. R. Co.....	960	Edwards v. Edwards.....	947
Dineen v. May.....	469	Elder, Unterberg v.....	647
Dollard, Matter of	926	Elefanto, People v.....	958
Donahue v. McCorkle.....	925	Eline v. Eline.....	944
Donoghue v. Callanan.....	916	Elliott, Peirano v.....	914
Donohue, Color Photography Co. v.....	918, 914	Empire Limestone Co. v. Millard & Lupton Co. (No. 1).....	928
Donohue v. Gilman.....	955	Empire Limestone Co. v. Millard & Lupton Co. (No. 2).....	929
Dooley, Schueler v.....	814	Engle, Levy v.....	915
Dooling v. City of New York...	953	Epstein v. Sussman.....	950
Dory, People v.....	912	Equitable Trust Co. v. Moss ...	615
Douglas Copper Co., Sweeney v.	568	Erie R. R. Co., Biehl v.....	922, 956
Douglass v. Carlin Construction Co.	856	Erie R. R. Co., Brockenshire v.....	933
Droney, Dunlevie v.....	930	Erie R. R. Co., Crotty v.....	262
Druminer, Matter of, v. Town of Dayton.....	931	Erie R. R. Co., Sheusi v.....	932
Drummond v. Norton Company.	915	Ermold v. Kaltenhauser.....	917
Drummond, People ex rel. Meeks v.....	915	Evans, Meyers v.....	936
Duell, Matter of.....	690	Evans, People ex rel., v. Baker..	917
Duffy v. City of New York	478	Everett v. Field.....	913
Duffy Company v. Fischetti....	925		
Duffy-McInnerney Co., Mitzky v.....	931	F.	
Dunbar v. New York Veal & Mutton Co.....	942	Faden, Bornstein v.....	87
Dunlevie v. Droney.....	930	Fairchild v. Leo.....	31
Dunn v. New York Central & H. R. R. R. Co.....	929, 932	Faitoute, People ex rel., v. Creelman.....	943
Dutton, People v.....	943	Fargo, Bistany v.....	929
Dwight, Matter of.....	912	Farley, Allen v.....	944
Dyer, People ex rel., v. McClellan.....	942	Farley v. Gordon.....	925
		Farley, Matter of, v. Whalen...	637
		Farmers' Loan & Trust Co. v. Bowne.....	945
		Federal Sign System v. Soutsos.	943
		Feist & Sons Co. v. Huber.....	935
		Felberbaum v. Bronstein.....	960
		Feldberg, Matter of Gordon v... .	246
		Felt v. Germania Life Ins. Co... .	14
Eagle Ins. Co. of London, Bauer v.....	943	Fennelly, Matter of.....	933
Earnest v. Delaware, Lackawanna & W. R. R. Co.....	330	Ferguson v. Sellers Co.....	945
East Massapequa Realty Co., Bingham v.....	925	Ferguson v. Town of Lewisboro.	232
East One Hundred & Eighty-ninth St. Bldg. & Constr. Co., Colon & Co. v.....	946	Fernandes, Woemple v.....	933
East Syracuse, Village of, Hubert v.....	934	Feynman v. Goldberg.....	924
Eastman Kodak Co., Brady v....	934	Field, Everett v.....	918
Eckerson, Mulry v.....	29	Fifth Avenue Coach Co., Horn v. (2 cases).....	914
Edmead, Wing v.....	952	Figge, Daust v.....	955
		Finley v. Kleinman.....	926
		Fischer, Bohnhoff v.....	747, 956
		Fischer, Matter of (In re Unnamed Street).....	618

TABLE OF CASES REPORTED.

xv

PAGE.	PAGE.
Fischer v. New Yorker Staats-Zeitung.....	48
Fischetti, Duffy Company v....	925
Fisher, Goodstein v.....	914
Fitz Gerald, Reilly v.....	945
Flaxman, People ex rel., v. Hennedy.....	927
Fleischman, Mutual Life Ins. Co. v.....	23
Flick v. Wyoming Valley Trust Co.....	546
Flocker v. Hudson & Manhattan R. R. Co.	942
Flynn v. Judge.....	278, 953
Follinsby v. Brooklyn Heights R. R. Co.	958
Fordham, Matter of (Croker v. Fordham).....	916
Fordon v. Fordon.....	947
Forman & Zelter, Inc., v. Thatcher.....	931
Foster & Glidden Engineering Co., Rochester Hotel Corporation v.....	936
Fox v. Bainbridge.....	958
Fox, International Text Book Co. v.....	369
Fox v. Kahn.....	928
Fox, Neu v.....	922
Frances Steel Co., Herrmann v.....	942
Frank v. City of New York.....	947
Franklin v. Leiter.....	678
Frazer, Ripley v.....	399
French-American Wine Co., Hall v.....	609
Friedebaum, People v.....	917
Friedman, People v.....	873
Frontier File Co., Welch v.....	931
Fund v. Spivack.....	945
G.	
Gaffey, Terry v.....	935
Gaffney, Central Trust Co. of N. Y. v.....	918
Garrison, Trust Co. of America v.....	956
Garvey v. Oldbury Electro-Chemical Co.....	931
Gas Engine & Power Co., McCoy v.....	956
Gate Development Co., Koechl v.....	239
Gaynor, Matter of Whitten v....	923
General Supply & Construction Co. v. Goelet.....	80
Gennu, Matter of Broadbrooks v.	937
Geraerdt v. Rosenberg.....	922
German Savings Bank in the City of New York, Matter of..	916
Germania Life Ins. Co., Felt v....	14
Gibson, Scanlin v.....	938
Gillen v. New York Butchers' Dressed Beef Co.....	914
Gillette Ice Machine Co., Ohl v.....	918
Gilman, Donohue v.....	955
Gilmore, Clarke v.....	445
Gilroy, People ex rel. Starrett v.	925
Glatner v. Glatner.....	89
Glendinning, McLeish & Co., Ltd., Turtle v.....	946
Glockner, Brand v.....	946
Goelet, General Supply & Construction Co. v.....	80
Goin, Schwartz v.....	496
Goldberg, Feynman v.....	924
Goldsmith, Conroy v.....	912
Goldstein, People ex rel. Bondwin v.....	914
Goldstein, Quartin v.....	952
Goldstein, Sexton v.....	943
Goldstein v. Tank.....	341
Gompert v. Healy.....	198
Goodrich v. Rockwood.....	944
Goodstein v. Fisher.....	914
Goossen, People ex rel. City of New York v.....	660
Gordon, Farley v.....	925
Gordon v. Law Reporting Co.	923, 958
Gordon, Matter of, v. Feldberg.	246
Gorham Company v. United Engineering & Contracting Co.....	915, 942
Gorlitzer v. Wolffberg.....	916, 941
Gott, Caboni v.....	440
Gottshall v. Pennsylvania R. R. Co.	937
Graham, Ryan v.....	935
Grand Lodge, Ancient Order of United Workmen, Segeritz v.....	914, 948

PAGE.	PAGE.		
Grand Lodge, Knights of Pythias, etc., v. Myers.....	952	Harriman v. Leggett & Co.....	944
Granulator Soap Co. v. Had-dow.....	926	Hartman, People v.....	912
Green v. Green.....	960	Hartridge v. Mayer.....	915
Greenberg, Rotheim v.....	916	Hasse v. Hasse.....	775
Greis, Callahan v.....	954	Hatch, Lord & Taylor v.....	608
Grider St. (In re City of Buffalo).	931	Hatch v. Luckman.....	937
Griffin, Matter of Hoglund v....	956	Hatch, People ex rel., v. Car-penter	987
Griffin, People v.....	931	Hauserman v. Weismann.....	961
Grzywacz v. New York Central & H. R. R. R. Co.....	936	Haverty, Warrin v.....	584
Guenther v. Ridgway Co. (Nos. 1 & 2).....	948	Hayes Lithographing Co., Mave- rick-Clarke Litho Co. v.....	981
H.		Healy, Gompert v.....	198
H. G. Realty Co., Mutual Coal Co. v.....	946	Hearst, City of New York v.....	948
Habenicht v. Hencken & Willen-brock Co.....	914	Hebbard v. New York & Queens Co. R. Co.....	952, 960
Habicust v. United States Gyp-sum Co.....	934	Hedden Construction Co., Tracy v.....	851
Haddow, Granulator Soap Co. v.....	926	Heft, Taylor v.....	948
Haggerty, Matter of ... 922, 928, 955		Hempstead, Town of, v. Law- rence.....	922
Hall v. French-American Wine Co.....	609	Hencken & Willenbrock Co., Habenicht v.....	914
Hall v. Hall.....	949	Hennessy, People ex rel. Flax- man v.....	927
Halloran v. Long Island R. R. Co.....	915	Hennessy, People ex rel. Mas- solles v.....	952
Hamburg-American Packet Co., Coonan v. (No. 1).....	951	Hepner v. Hepner.....	949
Hamburg-American Packet Co., Coonan v. (No. 2).....	925	Herriman, New York County Nat. Bank v.....	947
Hamburg-American Packet Co., Coonan v. (No. 3).....	960	Herrmann v. Frances Steel Co..	942
Hamburg-Amerikanische Pack- etfahrt Actien Gesellschaft, Schweitzer v.....	900	Hertz, People ex rel., v. Warden of City Prison of City of New York. (2 cases).....	939
Hamilton v. Mendham.....	907	Heydenreich, Sterling v.....	850
Hammond, Seeley v.....	959	Heymann, Matter of.....	947
Hammond Typewriter Co., Han-nahs v.....	916	Heymsfeld, Corn v.....	943
Hankowska v. Buffalo Savings Bank	929	Hibbard, Brettle v.....	931
Hanlien, Kearney v.....	524	Hicks v. Sarano.....	926
Hannahs v. Hammond Type-writer Co.....	916	Hicks, Ware v.....	960
Hannan v. McCain.....	955	Hildebrand, Johnson Service Co. v.....	680
Harden, Matter of, v. Hoops....	916	Hilderbrandt v. Seitz.....	924
Hardin, Spencer v.....	667	Hinkle, Batchelor v.....	910
Harley v. Plant.....	719	Hinrichs v. Butts.....	286
		Hintze v. New York Central & H R R. R. Co.....	217
		Hirschberg v. Kruger.....	958
		Hitchcock, Muck v.....	323
		Hitchcock, Matter of, v. Union Ferry Co.....	824

TABLE OF CASES REPORTED.

xvii

PAGE.	PAGE.		
Hodges, Hurley v.....	985	International Capital Develop-	
Hoglund, Matter of, v. Griffin..	958	ment Co., Mancuso v.....	916
Holden, Kelly v.....	947	International R. Co., Boehmer	
Holden, Maloney v.....	947	v.....	937
Holywell, Matter of.....	980	International R. Co., Jendraszek	
Home Trust Co. of N. Y. v.		v.....	935
Collins.....	959	International R. Co., Schlicht v.	933
Hoops, Matter of Harden v....	918	International R. Co., Ward v...	930
Hopper, Matter of, v. Britt....	94	International Text Book Co. v.	
Horan, Matter of, v. Porter....	938	Fox.....	869
Horn v. Fifth Avenue Coach Co.		Isaacs, Johnson v.....,....	640, 947
(3 cases).....	914	Isaacs, Kornbluth v.....	108
Horton v. Petrillo.....	969	Italian Savings Bank of the City	
Hotchkiss, Des Jardins v.....	943	of New York v. De Angelis....	916
Hotel Gotham Co., Montague v.	687		
Hotel Gotham Co., Montague v.		J.	
(2 cases).....	942	Jacobs v. Denzer.....	912
Howard v. McNulty.....	915	Jacobus v. Jamestown Mantel	
Hoyer, Buffalo, Lockport &		Co.....	356
Rochester R. Co. v.....	984	Jacocks v. Morrison.....	558
Huber, Feist & Sons Co. v....	935	Jaffe v. Weld.....	942
Huber v. Marinaccio	952	Jamestown Mantel Co., Jacobus	
Hudson Iron Co. v. Mershon....	556	v.....	356
Hudson & Manhattan R. R. Co.,		Jaramillo, Restrepo v.....	941
Flocker v.....	942	Jendraszek v. International R.	
Hudson & Manhattan R. R. Co.,		Co.....	985
Neale, Inc., v.....	917	Jergens, McCargo v. (No. 2)....	587
Hudson Structural Steel Co.,		Johnson v. Autopress Co.....	948
Scheier v.....	944	Johnson v. Isaacs.....	640, 947
Hughes v. Sheffield Farms		Johnson v. Nassau Electric R. R.	
Slawson Decker Co.....	945	Co.....	981
Hulbert v. Village of East Syra-		Johnson v. Riter-Conley Mfg.	
cuse.....	984	Co.....	543
Hurley v. Hodges.....	935	Johnson Service Co. v. Hilde-	
Hurley, Pakas v.....	909	brand.....	680
Hurley v. Wardell. (2 cases)....	961	Johnston, Macioce v.....	953
Hurry, Maloney v.....	914, 947	Johnstone v. Mills.....	915
Huyler, Wynkoop Hallenbeck		Joline, Maida v. (2 cases)....	943
Crawford Co. v.....	944	Joline, Walsh v.....	945
Hyde, People v.....	181	Jones, Matter of Vilarosa v....	949
Hyland v. Mark.....	980	Joyce v. Curtis.....	983
		Judge, Flynn v.....	278, 953
		Jung, Cox v.....	942
I.			
Iannone v. United Engineering		K.	
& Construction Co.....	387	Kahn, Fox v.....	928
Illinois Surety Co., D'Elette v..	948	Kaiser & Co., Keiser, Inc., v....	944
Imperial Garage v. Ryttenberg.	989	Kaltenhauser, Ermold v.....	917
Independent Democratic Certifi-		Kane v. Simons.....	50
cate (In re Smith).....	957	Kaplan v. Mendetz.....	949
Independent Order Ahawas		Kearney v. Hanlien.....	524
Israel, Natowitz v.....	607		

PAGE.	PAGE.
Keiser, Inc., v. Kaiser & Co.....	944
Kelley v. Carton.....	914
Kelley v. Ward.....	443
Kellum v. Corr.....	200
Kelly v. Holden.....	947
Kenen v. Superior Axle & Forge Co.....	935
Kent v. De Coppel.....	589
Kent v. Wilson.....	841
Kenyon, Matter of (In re Mar- tin).....	932
Keshin, Blitstein & Co., Matter of, v. Beckerman Constr. Co..	953
Kinkade v. Live Oak Copper Mining & Smelting Co.....	940
Kinston Cotton Mills v. Kuhne.	945
Kirkwood v. Smith.....	946
Klein v. Brooklyn Majestic Thea- tre Co. (No. 1).....	926
Kleiner v. Cohn. (2 cases).....	943
Kleinman, Finley v.....	926
Kling, Muller v.....	176
Knickerbocker Trust Co. v. Mil- ler.....	685, 917
Koch, People v. (Complaint of Pitt).....	927
Koch, People v. (Complaint of Rooney).....	927
Koechl v. Gate Development Co.	239
Koehler & Co., Inc., Bokor v....	914
Koenig, Matter of, v. Britt.....	68
Kornbluth v. Isaacs.....	108
Kozlowski v. Rochester, Syra- cuse & Eastern R. R. Co.....	932
Krelsovitch, Norwegian Lu- theran Trinity Church v.....	961
Kridel v. Bloomingdale.....	605
Kruger, Hirschberg v	958
Kuhne, Kinston Cotton Mills v.	945
Kuttner, Matter of, v. Ulman. (2 cases)	917
L.	
La Due v. New York, Chicago & St. L. R. R. Co.....	928
Laarson v. Cameron.....	952
Lachmann v. People.....	959
Lafayette Hotel Co., Morning- star v.....	934
Lake Shore & Michigan South- ern R. Co., Lindner v.....	936
Lambert, Matter of.....	953
Lang v. Mueller.....	926
Larner v. New York Transpor- tation Co.....	193
Lathrop, Di Napoli v.....	956
Lathrop, Welker v.....	935
Lattanzio v. Sarantonio.....	927
Lavine v. Lavine.....	947
Law Reporting Co., Gordon v..	923
	953
Lawrence, Town of Hempstead v.....	923
Le Baron v. Barker.....	927
Leap v. Associated Operating Co.....	859
Leask, Batchis v.....	713
Leavitt, Matter of.....	944
Lederle, People ex rel. Rudman v.....	915
Leeming, Murdock v.....	927
Leerburger v. Polstein.....	943
Legal Aid Bureau of Buffalo, Matter of.....	935
Leggett & Co., Harriman v....	944
Lehan v. Sisters of Charity of St. Vincent de Paul.....	946
Leiter, Franklin v.....	678
Lent, Matter of.....	947
Leo, Fairchild v.....	81
Leonard, People ex rel., v. Cropsey.....	730
Lesser, Matter of.....	938
Levine, People v.....	915
Levy v. Berg	945
Levy v. Engle.....	915
Levy v. Levy.....	561
Lewis, Cady v.....	928
Lewisboro, Town of, Ferguson v	232
Lighthouse, McGinn v.....	931
Lindley v. Campbell.....	935
Lindner v. Lake Shore & Michi- gan Southern R. Co.....	936
Lippman, People v.....	917
Lipschitz v. Berkovitz.....	949
Litchfield Construction Co., Sartori v.....	241
Live Oak Copper Mining & Smelting Co., Kinkade v.....	940
Lockhart, Walbaum v.....	937
Loder, Matter of.....	944

TABLE OF CASES REPORTED.

xix

PAGE.	PAGE.		
Loketz, Cohen v.....	951	Matter of Abrahams.....	944
London Realty Co. v. Riordan..	943	Matter of Akin v. Custodian of Primary Records.....	950
Long Island R. R. Co., Connors v.....	830	Matter of Avrutis.....	945
Long Island R. R. Co., Hal- loran v.....	915	Matter of Bergdorf.....	529
Long Island R. R. Co. v. Mulry.	924	Matter of Blumberg (No. 1)....	303
	953	Matter of Blumberg (No. 2)....	926
Long Island R. R. Co., People v.	765	Matter of Boland.....	947
Loomis v. New York Central & H. R. R. R. Co.....	930	Matter of Broadbrooks v. Genno.	937
Loomis, Village of Carthage v..	935	Matter of Butterfield.....	948
Lord & Taylor v. Hatch.....	603	Matter of City of Buffalo (Grider St.)	931
Lowe, Matter of.....	347	Matter of City of Buffalo (Water Front between Georgia and Jersey Sta.) Proceeding No. 2.	929
Luber v. Connors.....	937	Matter of City of New York (West 151st St.).....	55
Luckman, Hatch v.....	937	Matter of Cornish.....	955
Ludewig v. Bosselman.....	943	Matter of Covert.....	932
Lutes v. Town of Warwick.....	809	Matter of Daniel	777
Luyties Brothers v. Zimmer- mann & Co.....	542	Matter of Dollard	926
Lynch v. Town of Rhinebeck..	921	Matter of Drummer v. Town of Dayton	981
Lynch, People ex rel., v. Pierce.	286	Matter of Duell.....	690
Lynskey, Shea v.....	943	Matter of Dwight.....	912
Lyons Falls, Village of, Beauty Spring Water Co. v.....	418	Matter of Farley v. Whalen....	637
Lyth v. Lyth.....	932	Matter of Fennelly.....	983
M.		Matter of Fischer (In re Un- named Street).....	618
Macbeth, Bloch v.....	951	Matter of Fordham (Croker v. Fordham).....	916
Macdonald, Berlinger v.....	5	Matter of German Savings Bank in the City of New York.....	916
Macioce v. Johnston.....	953	Matter of Gordon v. Feldberg..	246
Mahoney, Matter of.....	937	Matter of Haggerty....	922, 923, 955
Maida v. Joline. (2 cases)....	943	Matter of Harden v. Hoops.....	916
Maloney v. Holden.....	947	Matter of Heymann.....	947
Maloney v. Hurry.....	914, 947	Matter of Hitchcock v. Union Ferry Co.....	824
Maltby, O'Neill v.....	927	Matter of Hoglund v. Griffin....	956
Mancuso v. International Capi- tal Development Co.....	916	Matter of Holywell.....	960
Manhattan Trust Co., Central Trust Co. of New York v.....	941	Matter of Hopper v. Britt.....	94
Mannion v. Vail.....	924	Matter of Horan v. Porter.....	938
Manville, Cole v.....	48	Matter of Kenyon (In re Mar- tin)	982
Marcy, Sentinel Printing Co. v.	957	Matter of Keshin, Blitstein & Co. v. Beckerman Constr. Co.	958
Marinaccio, Huber v.....	952	Matter of Koenig v. Britt.....	68
Mark, Hyland v.....	930	Matter of Kuttner v. Ulman. (2 cases).....	917
Marks v. D. L. & W. R. R. Co..	933	Matter of Lambert.....	958
Marshall, Matter of.....	926		
Martin, Matter of.....	960		
Martin, Matter of (In re Kenyon).	932		
Massolles, People ex rel., v. Hen- nessy.....	952		

TABLE OF CASES REPORTED.

PAGE.	PAGE.		
Matter of Leavitt.....	944	Matter of Williams.....	9- 53
Matter of Legal Aid Bureau of Buffalo.....	935	Mattson v. Phoenix Constr. Co.	9 - 8
Matter of Lent.....	947	Maverick-Clarke Litho Co. v. Hayes Lithographing Co.....	9 31
Matter of Lesster.....	938	May, Dineen v.....	469
Matter of Loder.....	944	May, Smith v.....	928
Matter of Lowe.....	347	Mayer, Hartridge v.....	915
Matter of Mahoney.....	937	Mayper, Adler v.....	915, 947
Matter of Marshall.....	926	McAdoo, Pemberton v.....	20
Matter of Martin.....	960	McCain, Hannan v.....	955
Matter of McConaughy.....	922	McCargo v. Jergens (No. 2)....	537
Matter of McQuade. (2 cases)...	947	McCarton v. City of New York.	51 6
Matter of Miller.....	113, 944	McClellan, People ex rel. Dyer v.....	942
Matter of Minnesota Phono- graph Co.....	913	McClenahan, Coleman v.....	209
Matter of Myhill.....	404	McConaughy, Matter of.....	922
Matter of New York, West- chester & Boston R. Co. (In re Weeks).....	950	McConnell, Wright v.....	928
Matter of Newark & Marion R. Co.....	936	McCorkle, Donahue v.....	925
Matter of Newell.....	920	McCorry v. Wiarda & Co.....	863
Matter of Peck.....	912	McCoy v. Gas Engine & Power Co.....	95
Matter of People ex rel. Carey Construction Co. v. Smith....	882	McCrea, Becker v.....	21
Matter of Preston v. Tuck.....	957	McCue v. Brooklyn Heights R. R. Co.....	91
Matter of Propping.....	957	McDonnell v. Metropolitan Bridge & Construction Co....	92
Matter of Reynolds.....	924	McFarland v. Sharkey.....	55
Matter of Rice.....	958	McGinn v. Lighthouse.....	931
Matter of Salter.....	957	McGough v. City of New York..	959
Matter of Sebring.....	985	McKay v. Syracuse Rapid Tran- sit R. Co.....	929
Matter of Smith (In re Inde- pendent Democratic Certifi- cate).....	957	McMillan Book Co., Peters v....	934
Matter of Snitkin.....	917	McMullen v. Arbuckle.....	953
Matter of Solotaroff.....	914	McNulty, Howard v.....	915
Matter of Stoddard.....	947	McNulty Brothers, Anderson v.	735
Matter of Townsend v. Custo- dian of Primary Records.....	950	McQuade, Matter of. (2 cases)...	947
Matter of Trustees of City & County Hall, City of Buffalo.	933	McTaggart v. Sheffield Farms Slawson Decker Company....	91
Matter of Turner.....	948	Mechanics Bank v. Becker.....	92
Matter of Vacheron.....	943	Meeks, People ex rel., v. Drum- mond	91
Matter of Vilarosa v. Jones.....	949	Mellen v. Athens Hotel Co.....	53
Matter of Village of Bronxville (In re Public Service Com.)...	957	Mendelsohn, Diamond v.....	94
Matter of Village of Bronxville v. Stevens.....	953	Mendetz, Kaplan v.....	94
Matter of Wagener.....	947	Mendham, Hamilton v.....	90
Matter of White.....	428	Menihan Co., Chick v.....	929, 93
Matter of Whitten v. Gaynor...	923	Mensing v. Cook Iron Store Co.	93
		Merritt, People v.....	95
		Mershon, Hudson Iron Co. v....	55
		Metropolitan Bridge & Construc- tion Co., McDonnell v.....	923

TABLE OF CASES REPORTED.

xxi

PAGE.	PAGE.
Metropolitan Hotel Supply Co.,	Moynahan, People ex rel. Quar-
Mohrmann v..... 955	anto v..... 954
Meyer v. Cramer..... 917	Muck v. Hitchcock..... 323
Meyers v. Evans..... 936	Mueller, Lang v..... 926
Meyers v. North American Watch Co..... 215, 953	Muller v. Brooklyn Heights R. R. Co..... 955
Michaelson, People v..... 945	Muller v. Kling..... 176
Miles v. Terry & Tench Co..... 521	Mulligan, Shotland v..... 943
Millard & Lupton Co., Empire Limestone Co. v. (No. 1)..... 928	Mulry v. Eckerson..... 29
Millard & Lupton Co., Empire Limestone Co. v. (No. 2)..... 929	Mulry, Long Island R. R. Co. v..... 924 953
Miller v. Buffalo & Lake Erie Traction Co..... 396	Mulvany, Brown v..... 948
Miller, Knickerbocker Trust Co. v..... 685, 917	Munger v. Wood..... 931
Miller, Matter of..... 118, 944	Murdock v. Leeming..... 927
Miller, Orange County Trust Co. v..... 292	Murphy v. City of New York..... 954
Mills, Johnstone v..... 915	Murphy v. Newgass..... 014
Minnesota Phonograph Co., Matter of..... 918	Musica, Dickerson v..... 960
Mitchell, Beekman v..... 946	Musical Courier Co., Burkan v..... 942
Mitchell v. Mitchell..... 897	Mutual Coal Co. v. H. G. Realty Co..... 946
Mitzky v. Duffy-McInnerney Co. 931	Mutual Life Ins. Co. v. Fleisch- man..... 23
Mohrmann v. Metropolitan Ho- tel Supply Co..... 955	Myers, Grand Lodge, Knights of Pythias, etc., v..... 952
Mona, People v..... 915	Myers, Skidmore v..... 947
Moneuse, San Remo Copper Mining Co. v..... 26, 917	Myhill, Matter of..... 404
Monks & Sons v. West Street Improvement Co..... 504	 N.
Montague, City of New York v. (No. 1)..... 475	Nassau Electric R. R. Co., Johnson v..... 961
Montague, City of New York v. (No. 2)..... 601	Natanson, Adler v..... 915
Montague v. Hotel Gotham Co. 687	Nathan v. Woolverton..... 791, 960
Montague v. Hotel Gotham Co. (2 cases)..... 942	National Bank of Commerce, People ex rel. v. Purdy (Taxes of 1901-1907)..... 948
Montgomery Brothers & Co., Cimmer v..... 388	National Reserve Bank, Abel v. 710
Moore v. City of New York..... 955	National Reserve Bank, People ex rel., v. Purdy (Taxes of 1903- 1907)..... 948
Morgan, Palmeso v..... 924	National Sugar Refining Co., Butnors v..... 925
Morningstar v. Lafayette Hotel Co..... 934	National Surety Co., Wolowitch v. (2 cases)..... 947
Morrison, Jacocks v..... 558	Natowitz v. Independent Order Ahawas Israel..... 607
Morse Dry Dock & Repair Co., O'Malley v..... 788	Neale, Inc., v. Hudson & Man- hattan R. R. Co..... 917
Morton, Von Munchow v..... 957	Nellis, Vroom v..... 961
Mosely, Ottawa v..... 933	Neu v. Fox..... 922
Moss, Equitable Trust Co. v.... 615	Nevillé, People ex rel. New York Central & H. R. R. Co. v.... 923

PAGE.	PAGE.
New Academy Theater Co., Thompson v..... 929, 932	New York, City of, Hearst... 948
New Paltz, Highland & Pough- keepsie Traction Co., Wiethan v..... 923	New York, City of, Matter of (West 151st St.)..... 55
New York & Brooklyn Brewing Co., Carlin Construction Co. v..... 919	New York, City of, McCarton v. 516
New York Butchers' Dressed Beef Co., Gillen v..... 914	New York, City of, McGough v. 959
New York Central & H. R. R. R. Co., Concklin v..... 739	New York, City of, Montague (No. 1)..... 475
New York Central & H. R. R. R. Co., Brown Contracting Co. v. 935	New York, City of, Montague (No. 2)..... 601
New York Central & H. R. R. R. Co., Davenport v..... 492	New York, City of, Moore v.... 955
New York Central & H. R. R. R. Co., Dunn v..... 929, 932	New York, City of, Murphy v... 954
New York Central & H. R. R. R. Co., Grzywacz v..... 936	New York, City of, Oppen- heimer v. (Chelsea Bank)..... 172
New York Central & H. R. R. R. Co., Hintze v..... 217	New York, City of, Oppen- heimer v. (Security Bank).... 175
New York Central & H. R. R. R. Co., Loomis v..... 930	New York, City of, Richards v.. 928
New York Central & H. R. R. R. Co., Norton v..... 931	954
New York Central & H. R. R. R. Co., Spila v..... 961	New York, City of, Seelye- Taylor Co..... 98
New York Central & H. R. R. R. Co., Weagant v..... 933	New York, City of, Shanley v... 187
New York Central & H. R. R. R. Co., People ex rel., v. Neville. 923	New York, City of, Shute v.... 758
New York, Chicago & St. L. R. R. Co., La Due v..... 928	New York, City of, Staats v.... 946
New York, City of, Asphalt Paving & Contracting Co. v. (No. 1)..... 692	New York, City of, Staten Island Water Supply Co. v..... 923
New York, City of, Asphalt Paving & Contracting Co. v. (No. 2)..... 622	New York, City of, Taber v..... 958
New York, City of, Brady v.... 816	New York, City of, Uvalde As- phalt Paving Co. v..... 491
New York, City of, v. Central Park, North & East River R. R. Co..... 944	New York, City of, v. Warren- Scharf Asphalt Paving Co.... 638
New York, City of, Dady v..... 956	New York, City of, People ex rel., v. Bronx Bath Co..... 661
New York, City of, Davis v.... 955	New York, City of, People ex rel., v. Dickey..... 676
New York, City of, Di Crescenti v..... 816	New York, City of, People ex rel., v. Goossen..... 660
New York, City of, Dooling v... 953	New York, City of, People ex rel., v. Olssen..... 662
New York, City of, Duffy v.... 478	New York, City of, People ex rel., v. Sandrock Realty Co..... 651
New York, City of, Frank v.... 947	New York County Nat. Bank v. Herrman..... 947

TABLE OF CASES REPORTED.

xxiii

PAGE.	PAGE.
New York, New Haven & Hartford R. R. Co. v. Village of Port Chester.....	893
New York & Queens Co. R. Co., Dilluvio v.....	960
New York & Queens Co. R. Co., Hebbard v.....	952, 960
New York & Queens Co. R. Co., Trieber v.....	804
New York Times Co., Cohen v..	956
New York Transportation Co., Larner v.....	193
New York Veal & Mutton Co., Dunbar v.....	942
New York, Westchester & Boston R. Co., Matter of (In re Weeks).....	959
New Yorker Staats-Zeitung, Fischer v.....	48
Newark & Marion R. Co., Matter of.....	936
Newbery v. Sullivan.....	954
Newell, Matter of.....	929
Newgass, Murphy v.....	914
Niagara Falls Power Co., Round v.....	931, 936
Nicoud v. New York Life Ins. Co.....	784
Niles v. Winkler.....	945
Ninigret Mills Co. Von Bayer v.	578
Noonan v. Buffalo & Lake Erie Traction Co.....	984
North American Watch Co., Meyers v.....	953
Norton v. Benz.....	913
Norton v. New York Central & H. R. R. R. Co.....	981
Norton Company, Drummond v.....	915
Norwegian Lutheran Trinity Church v. Krelsvitch.....	961
O.	
O'Malley v. Morse Dry Dock & Repair Co.	788
O'Neill v. Maltby.....	927
Oakford, People v.....	918
Ocean Accident & Guarantee Corp., Ltd., Borowski v.....	933
Offerman, Ridge of Brooklyn Realty Co. v.....	878
ohl v. Gilette Ice Machine Co.	918
Oldbury Electro-Chemical Co., Garvey v.....	931
Olssen, People ex rel. City of New York v.....	662
Onondaga County v. Strong.....	934
Oppenheimer v. City of New York (Chelsea Bank).....	172
Oppenheimer v. City of New York (Security Bank).....	175
Orange County Trust Co. v. Miller.....	292
Osborn v. Perry.....	917
Ottaway v. Moseley.....	988
Overstreet, Bugbee v. (3 cases).	918
Owen & Co., Poppenberg v.....	932
Owens, Stern v.....	954
Oyster Bay, Town of, v. Stehli..	957
P.	
Packard v. Brittan.....	916
Pakas v. Hurley.....	909
Palma v. Union Fork & Hoe Co.	937
Palmer & Singer Mfg. Co. v. Barney Estate Co.	186
Palmeso v. Morgan.....	924
Parsons v. Curran.....	762
Pearson v. Reed.....	959
Peck, Matter of.....	912
Peck, Rosenfeld v.....	663
Peekskill Lighting & Railroad Co., Di Stefano v.	745
Peirano v. Elliott.....	914
Pelham, Town of, v. Shinn.....	956
Pell & Co., Claussen v.....	947
Pemberton v. McAdoo.....	20
Pennica v. Delaware, Lackawanna & Western R. R. Co...	954
Pennsylvania R. R. Co., Gottshall v.....	937
Pennsylvania R. R. Co., Potter v.....	935
People v. Bevins.....	935
People v. Bloom.....	295
People v. Butler, Inc.....	922
People v. Calabrese.....	955
People v. Cole.....	912
People v. De Pretie.....	943
People v. Dory.....	912
People v. Dutton.....	943
People v. Elefanto.....	958

TABLE OF CASES REPORTED.

PAGE.	PAGE.		
People v. Friedebaum.....	917	People ex rel. Coal & Iron Nat. , Bank v. Purdy (Taxes of 1904- 1907).....	948
People v. Friedman.....	873	People ex rel. Crozier v. Baker..	957
People v. Griffin.....	981	People ex rel. Dyer v. McClel- lan.....	942
People v. Hartman.....	912	People ex rel. Evans v. Baker... People ex rel. Faitoute v. Creel- man.....	917 943
People v. Hyde.....	181	People ex rel. Flaxman v. Hen- nessy.....	927
People v. Koch (Complaint of Rooney).....	927	People ex rel. Hatch v. Carpen- ter.....	937
People v. Koch (Complaint of Pitt).....	927	People ex rel. Hertz v. Warden of City Prison of City of New York. (2 cases)	939
People, Lachmann v.....	959	People ex rel. Leonard v. Crop- sey.....	730
People v. Levine.....	915	People ex rel. Lynch v. Pierce.. People ex rel. Massolles v. Hen- nessy	286 952
People v. Lippman.....	917	People ex rel. Meeks v. Drum- mond	915
People v. Long Island R. R. Co.	765	People ex rel. Nat. Bank of Commerce v. Purdy (Taxes of 1901-1907).....	948
People v. Merritt.....	959	People ex rel. Nat. Reserve Bank v. Purdy (Taxes of 1903-1907)..	948
People v. Michaelson.....	945	People ex rel. New York Central & H. R. R. Co. v. Neville..	923
People v. Mona.....	915	People ex rel. New York Edison Co. v. Willcox.....	671
People v. Oakford	913	People ex rel. Quaranto v. Moy- nahan.....	954
People v. Rinkel.....	944	People ex rel. Rudman v. Led- erle.....	915
People v. Scannavino.....	912	People ex rel. Ryan v. Supt. of State Reformatory for Women at Bedford...	794
People v. Schultz.....	844,	People ex rel. Seaman v. Cocks.	883
People v. Sheffield Farms-Slaw- son Decker Co.....	923	People ex rel. Smith v. Creelman.	716
People v. Smith.....	917	People ex rel. Starrett v. Gilroy.	925
People v. Strauss.....	947	People ex rel. Town of Scarsdale v. Board of Supervisors of Westchester County.....	819
People v. Tancredi.....	915	People ex rel. Victory v. Spooner.	959
People v. Von Kampen.....	887	People ex rel. Ward v. Cropsey.	946
People v. Weiss.....	913	People's National Bank of Hack- ensack v. Rice.....	18
People ex rel. Ambrose v. Tom- kins.....	946	Perlmutter, Sternberger v.....	949
People ex rel. Bank of Metropolis v. Purdy (Taxes of 1901-1907)..	948	Perry, Osborn v.....	917
People ex rel. Bavendam v. Baker.....	958		
People ex rel. Bondwin v. Gold- stein.....	914		
People ex rel. Britton v. Ameri- can Press Assn.....	917		
People ex rel. Carey Construc- tion Co., Matter of, v. Smith.	382		
People ex rel. Cavanagh v. Waldo	927		
People ex rel. City of New York v. Bronx Bath Co.....	661		
People ex rel. City of New York v. Dickey.....	676		
People ex rel. City of New York v. Goossen.....	660		
People ex rel. City of New York v. Olssen.....	662		
People ex rel. City of New York v. Sandrock Realty Co.....	651		

TABLE OF CASES REPORTED.

xxv

PAGE.		PAGE.	
Peters v. McMillan Book Co....	934	Purdy, People ex rel. Bank of Metropolis v. (Taxes of 1901-1907).....	948
Peters, Smith v.....	961	Purdy, People ex rel. Coal & Iron Nat. Bank v. (Taxes of 1904-1907).....	948
Petrillo, Horton v.....	959	Purdy, People ex rel. Nat. Bank of Commerce v. (Taxes of 1901-1907).....	948
Petruzzi, Schulte v.....	907	Purdy, People ex rel. Nat. Reserve Bank v. (Taxes of 1903-1907).....	948
Pettit v. Pettit (No. 1).....	485		
Pettit v. Pettit (No. 2).....	937		
Philadelphia & Reading Coal & Iron Co., Andriuszis v.....	924		
Phoenix Constr. Co., Mattson v.	948		
Pierce, Deering v.....	10		
Pierce, People ex rel. Lynch v..	286		
Pinelawn Cemetery, Tyndall v..	913		
Pinelawn Cemetery, Tyndall v. (2 cases).....	917, 947		
Pitt (People v. Koch).....	927		
Plant, Harley v.....	719		
Pollock v. Queens Land & Title Co.....	954		
Polstein, Leerburger v.....	948		
Pomeranz, Caroncano v.....	928		
Pomeroy Co. v. Wells Brothers Co. (2 cases).....	678		
Poppenberg v. Owen & Co.....	932		
Poppenhusen v. Poppenhusen..	307		
Port Chester, Village of, New York, New Haven & Hartford R. R. Co. v.....	898		
Port Jefferson Milling Co., Trustees, etc., of Town of Brookhaven v.....	956		
Porter, Matter of Horan v.....	938		
Porter v. Sabins	985		
Poschmann v. Poschmann.....	907		
Posner v. Rosenberg (No. 1)....	270		
Posner v. Rosenberg (No. 2)....	272		
Post v. Post.....	452		
Postum Cereal Co., Ltd., Collier v.....	148		
Potter v. Buffalo, Lockport & Rochester R. Co.....	935		
Potter v. Pennsylvania R. R. Co.	935		
Poughkeepsie Light, Heat & Power Co., Anderson v.....	922		
Pratt, Todd v.....	459		
Precious Metals Corporation, Clarke v.....	938		
Preston, Matter of, v. Tuck.....	957		
Propping, Matter of.....	957		
Public Service Com., Matter of (In re Village of Bronxville)...	957		
Pulis v. Stewart.....	933		
		Q.	
Quaranto, People ex rel., v. Moynahan.....	954		
Quartin v. Goldstein.....	952		
Queens Land & Title Co., Pollock v.....	954		
		R.	
Rainey Pier Co., Ward v.....	707		
Rainier, Washburn v.....	800		
Rambaut v. Tevis.....	942		
Ramstrom v. Barnes Mfg. Co...	959		
Rathbone, Town of, Austin v.....	991		
Ravitch, Beirne v.....	952		
Read, Chapman v.....	52		
Realty Securities Co., Cass v....	943		
Reed, Pearson v.....	959		
Reeve, Continental Ins. Co. v....	885		
Reilly v. Burkelman.....	548		
Reilly v. Fitz Gerald.....	945		
Restrepo v. Jaramillo.....	941		
Rexford v. Tanner.....	936		
Reynolds, Matter of.....	924		
Rhinebeck, Town of, Lynch v... Rice, Matter of.....	921		
Rice, People's National Bank of Hackensack v.....	18		
Richards v. City of New York ..	923		
Poughkeepsie Light, Heat & Power Co., Anderson v.....	954		
Ridge of Brooklyn Realty Co. v. Offerman	878		
Ridgway Co., Guenther v. (Nos. 1 & 2).....	948		
Rinkel, People v.....	918, 944		
Riordan, London Realty Co. v....	943		
Ripley v. Frazer.....	399		
Risch, Borgrosser v.....	248		

TABLE OF CASES REPORTED.

PAGE.	PAGE.		
Risolo, de Cristofano v.....	960	Savarese, Casassa v.....	248
Riter-Conley Mfg. Co., Johnson v.....	543	Scanlin v. Gibson.....	933
Roberts v. Thompson.....	437	Scannavino, People v.....	912
Rochester, City of, Clifford v....	932	Scarsdale, Town of, People ex rel., v. Board of Supervisors of Westchester County.....	319
Rochester Hotel Corporation v. Foster & Glidden Engineering Co.....	936	Scheier v. Hudson Structural Steel Co.....	944
Rochester, Syracuse & Eastern R. R. Co., Kozlowski v.....	932	Schlappendorf v. American Railway Traffic Co.....	959
Rockwood, Goodrich v.....	944	Schlicht v. International R. Co.	933
Rooney (People v. Koch).....	927	Schloendorff v. Society of the New York Hospital.....	915
Rosenberg, Geraerdt v.....	922	Schmitt v. Brooklyn Heights R. R. Co.....	925
Rosenberg, Posner v. (No. 1)....	270	Schneider, Union Bank.....	928
Rosenberg, Posner v. (No. 2)....	272	Brooklyn v.....	938
Rosendorf v. New York Edison Co.....	945	Schroeder v. Young.....	939
Rosenfeld v. Peck.....	663	Schueler v. Dooley.....	814
Rossiter v. Cooper's Glue Fac- tory.....	752	Schuhman v. Brooklyn Heights R. R. Co.....	946
Rotheim v. Greenberg.....	916	Schulte v. Petrucci.....	956
Round v. Niagara Falls Power Co.....	931, 936	Schultz, People v.....	907
Rubel, Smith v.....	670, 945	Schultz, Rubsamens v.....	944, 958
Rubsamen v. Schultz.....	944	Schultz v. Schultz.....	944
Rudman, People ex rel., v. Led- erle.....	915	Schwartz v. Goin.....	913
Russo-Chinese Bank v. Dick....	949	Schweitzer v. Hamburg-Ameri- kanische Packetsahrt Actien Gesellschaft.....	900
Ryan, Carlon v. (2 cases)....	947	Schweitzer, White v.....	954
Ryan v. Graham.....	935	Seaman, People ex rel., v. Cocks.	888
Ryan, People ex rel., v. Supt. of State Reformatory for Women at Bedford.....	794	Searcy v. Casualty Company of America.....	816
Ryttenberg, Imperial Garage v.	939	Sebring, Matter of.....	935
S.		Seeley v. Hammond.....	959
Sabins, Porter v.....	935	Seely-Taylor Co., City of New York v.....	98
Safir, Bryon v.....	908	Segeritz v. Grand Lodge, Ancient Order of United Workmen.....	914, 943
Salter, Matter of.....	957	Seitz, Hilderbrandt v.....	924
San Remo Copper Mining Co. v. Moneuse	26, 917	Sellers Co., Ferguson v.....	945
Sandrock Realty Co., People ex rel. City of New York v.....	651	Sentinel Printing Co. v. Marcy.	937
Santangelo, Caporali v.....	911	Sergeant, Barrett Mfg. Co. v... Seventeenth Street Realty Co. v. Auslander.....	1, 945
Saperston, Cowell v.....	373	Sexton v. Goldstein.....	949
Sarano, Hicks v.....	926	Shafer v. New York Life Ins. Co.	707
Sarantonio, Lattanzio v.....	927	Shanley v. City of New York..	187
Saratoga & Washington Fire Ins. Co., Slocum v.....	867	Sharkey, McFarland v.....	53
Sartori v. Litchfield Construc- tion Co.....	241	Shea v. Conant.....	53

TABLE OF CASES REPORTED.

xxvii

PAGE.	PAGE.		
Shea v. Lynskey.....	943	Soutsos, Federal Sign System v.	943
Sheffield Farms-Slawson-Decker Co., Hughes v.....	945	Spearin, Staten Island Ship- building Co. v.....	854
Sheffield Farms-Slawson-Decker Co., McTaggart v.....	917	Spencer v. Hardin.....	667
Sheffield Farms-Slawson-Decker Co., People v.....	923	Spila v. New York Central & H. R. R. Co.	961
Sheusi v. Erie R. R. Co.....	932	Spivack, Fund v.....	945
Shimko, Slater v.....	957	Spooner, People ex rel. Victory v.....	959
Shinn, Town of Pelham v.....	956	St. Stephen's Church v. Bastine.	943
Shotland v. Mulligan.....	943	Staats v. City of New York.....	946
Shreffler, Snow v. (In re Sebring).....	935	Standard Oil Co., Talcott v.....	694
Shute v. City of New York.....	758	Staples, Stokes v.....	948
Siegel-Cooper Co., Warren v.....	946	Star Co., Sloman v.....	500
Silverman, D'Amato v.....	948	Starrett, People ex rel., v. Gilroy.	925
Simons, Kane v.....	50	State Mutual Life Assurance Co., Arnett v.....	930
Simpson, Wood v. (No. 1).....	471	Staten Island Shipbuilding Co. v. Spearin.....	854
Simpson, Wood v. (No. 2).....	474	Staten Island Water Supply Co. v. City of New York.....	923
Sinclair v. Sinclair.....	949	Staudt, Beck v.....	85
Sire v. Browning.....	913, 943, 947	Steel Company, Herrmann v.....	942
Sisters of Charity of St. Vincent de Paul, Lehan v.....	946	Stehli, Town of Oyster Bay v.....	957
Skidmore v. Myers.....	947	Stehlin v. City & County Con- tract Co.....	961
Slater v. Shimko.....	957	Stein v. Stein.....	945
Slocum v. Saratoga & Wash- ton Fire Ins. Co.....	867	Steinberg v. Boston Ins. Co.....	945
Sloman v. Star Co.....	500	Sterling v. Heydenreich.....	850
Smidt v. Buffalo Cold Storage Co.....	984	Stern v. Owens.....	954
Smith v. Burns.....	255	Sternberger v. Perlmutter.....	948
Smith v. Camden Creamery....	930	Sterner v. Crist Company.....	914
Smith v. Cockcroft	255	Sterry v. Sterry.....	942
Smith, Kirkwood v.....	946	Stevens v. Amsinck.....	220
Smith, Matter of (In re Inde- pendent Democratic Certifi- cate).....	957	Stevens, Matter of Village of Bronxville v.....	953
Smith, Matter of People ex rel. Carey Construction Co. v.....	882	Stewart, Bartlett v.....	943
Smith v. May.....	928	Stewart, Pulis v.....	933
Smith, People v.....	917	Stoddard, Matter of.....	947
Smith v. Peters.....	961	Stokes v. Staples.....	948
Smith v. Rubel.....	670, 945	Stollwerck Bros., Cuppy v.....	947
Smith v. Smith.....	923	Storandt v. Vogel & Binder Co.	928
Smith, People ex rel. v. Creel- man.....	716	Stowell, Concordia Fire Ins. Co. of Milwaukee v.....	930
Snitkin, Matter of	917	Strauss, People v.....	947
Snow v. Shreffler (In re Sebring)	935	Strong, Onondaga County v....	934
Society of the New York Hospi- tal, Schloendorff v.....	915	Sugerman, Title Guarantee & Trust Co. v.....	925
Solotaroff, Matter of.....	914	Sullivan, Newbery v.....	954
		Sun Insurance Office, Crowley v.....	934

TABLE OF CASES REPORTED.

PAGE.	PAGE.
Superintendent of State Re-formatory for Women at Bedford, People ex rel. Ryan v....	794
Superior Axe & Forge Co., Kenen v....	935
Sussman, Epstein v.....	950
Swan v. Woodcock.....	937
Sweeney v. Douglas Copper Co.	568
Symmers v. Carroll.....	641
Syracuse, Lake Shore & Northern R. R. Co. v. Carrier.....	411
Syracuse Lighting Co., Brockway v.....	937
Syracuse Rapid Transit R. Co., McKay v.....	929
T.	
Taber v. City of New York.....	958
Talcott v. Standard Oil Co.....	694
Talley v. Talley.....	943
Tancredi, People v.....	915
Tank, Goldstein v.....	341
Tanner, Rexford v.....	936
Tausend v. Baggott.....	944
Taylor v. Heft.....	943
Taylor v. New York Life Ins. Co.....	936
Tepfer v. Burger.....	946
Teplisky, Davies v.....	953
Terry v. Gaffey.....	935
Terry & Tench Co., Miles v....	521
Tewis, Coffin v.....	942
Tewis, Rambaut v.....	942
Thatcher, Forman & Zelter, Inc., v.....	981
Thayer v. Thayer	912
Thompson v. New Academy Theater Co.....	929, 932
Thompson, Roberts v.....	437
Thompson, Wood Mfg. & Realty Co. v.....	253
Tichnor Brothers, Inc., v. Barley.....	871
Tisdale Lumber Co., Van Gaasbeek v.....	928
Title Guarantee & Trust Co. v. Sugerman.....	925
Todd v. Pratt.....	459
Tomkins, People ex rel. Ambrose v.....	946
Tomlinson v. Tomlinson.....	913
U.	
Ulman, Matter of Kuttner v. (2 cases).....	917
Union Bank of Brooklyn v. Schneider.....	928

TABLE OF CASES REPORTED.

xxix

PAGE.	W.	PAGE.	
Union Ferry Co., Matter of Hitchcock v.....	824	Wagener, Matter of.....	947
Union Fork & Hoe Co., Palma v.....	987	Walbaum v. Lockhart.....	937
United Engineering & Construc- tion Co., Iannone v.....	367	Waldo, People ex rel. Cavanagh v.....	927
United Engineering & Contract- ing Company, Gorham Com- pany v 915, 942		Walsh v. Joline.....	945
United States Gypsum Co., Habicust v.....	984	Walther, Whitelaw v.....	954
United Wireless Telegraph Co., Williams v. (7 cases).....	913	Ward v. Chelsea Exchange Bank.....	948
Unterberg v. Elder.....	647	Ward v. International R. Co....	930
Uptegraff, Turner Construction Co. v.....	936	Ward, Kelley v.....	443
Utica Knitting Co., Blenis v....	936	Ward v. Rainey Pier Co.....	707
Uvalde Asphalt Paving Co. v. City of New York.....	491	Ward, People ex rel. v. Cropsey. 946	
V.			
Vacheron, Matter of.....	943	Wardell, Hurley v. (2 cases)....	961
Vail, Manion v.....	924	Warden of City Prison of City of New York, People ex rel. Hertz v. (2 cases).....	989
Van Gaasbeek v. Tisdale Lum- ber Co.....	928	Ware v. Hicks.....	960
Van Ronk, Barrett Mfg. Co. v... 194		Warren v. Siegel-Cooper Co....	946
Van Valkenburgh v. Van Valkenburgh.....	482	Warren-Scharf Asphalt Paving Co., City of New York v.....	633
Victory, People ex rel. v. Spooner.....	969	Warrin v. Haverty.....	564
Vilarosa, Matter of, v. Jones....	949	Warwick, Town of, Lutes v.....	809
Village of Bronxville, Matter of, (In re Public Service Com.)....	957	Washburn v Rainier.....	800
Village of Bronxville, Matter of, v. Stevens.....	953	Washor, Crawford v.....	923
Village of Carthage v. Loomis..	935	Water Front between Georgia, & Jersey Sts., Matter of (In re City of Buffalo). Proceed- ing No. 2.....	939
Village of East Syracuse, Hul- bert v.....	934	Weagant v. New York Central & H. R. R. R. Co.....	933
Village of Lyons Falls, Beauty Spring Water Co. v.....	418	Weaver v. Weaver.....	939
Village of Port Chester, New York, New Haven & Hartford R. R. Co. v.....	893	Webb v. Brooklyn Heights R. R. Co.....	960
Vogel & Binder Co., Storandt v.....	928	Weeks, Matter of (In re New York, Westchester & Boston R. Co.).....	959
Von Bayer v. Ninigret Mills Co.	578	Weismann, Hanserman v.....	961
Von Kampen, People v.....	887	Weiss, People v.....	918
Von Munchow v. Morton.....	957	Welch v. Frontier File Co.....	931
Voorhees v. Collins.....	828	Welch Motor Car Co. v. Brady & Son Co.....	945
Vroom v. Nellis.....	961	Weld, Jaffe v.....	942
		Welker v. Lathrop.....	935
		Wells Bros. Co., Pomeroy Co. v. (2 cases).....	673
		Wells Bros. Co., Wittgren v....	961
		Werner v. Werner	511
		West One Hundred & Fifty- first St. (In re City of New York).....	85

TABLE OF CASES REPORTED.

PAGE		PAGE	
West Street Improvement Co.,		Wolowitch v. Nat. Surety Co.	
Monks & Sons v.....	504	(2 cases).....	947
Westchester County, Bd. of Su-		Wood v. Simpson (No. 2).....	474
pervisors of, People ex rel.		Wood Mfg. & Realty Co. v.	
Town of Scarsdale v.....	819	Thompson.....	253
Whalen, Matter of Farley v.....	697	Wood, Munger v.....	931
White, Matter of.....	428	Wood v. Simpson (No. 1)	471
White v. Schweitzer	954	Woodcock, Swan v.....	937
Whitelaw v. Walther.....	954	Woolverton, Nathan v.....	791, 960
Whitten, Matter of, v. Gaynor..	923	Wright v. McConnell.....	928
Wiarda & Co., McCorry v.....	863	Wynkoop Hallenbeck Crawford	
Wiethan v. New Paltz, Highland		Co. v. Huyler.....	944
& Poughkeepsie Traction Co..	923	Wyoming Valley Trust Co.,	
Willcox, People ex rel. New York		Flick v.....	546
Edison Co. v.....	671		
Williams, Matter of.....	953		
Williams v. United Wireless		Y.	
Telegraph Co. (7 cases)....	913	Young, Baruch v.....	466
Wilson, Kent v.....	841	Young v. Brower	913
Winckler v. Winckler..	250, 925,	Young, Schroeder v.....	955
Wing v. Edmead.....	952		
Winkler, Niles v.....	945		
Witherbee v. Bowles.....	913	Z.	
Wittgren v. Wells Bros. Co....	961	Zimmerman, Carscallen & Cas-	
Woempler v. Fernandes.....	932	sidy v.....	944
Woleben, Crosby v.	837, 936	Zimmermann & Co., Luyties	
Wolffberg, Gorlitzer v.....	916, 941	Brothers v.....	542
		Zuckert, Brooks v.....	953

TABLE OF CASES CITED.

A.	PAGE.
Abrahamson v. General Supply &	
Construction Co.....	112 App. Div. 318..... 189, 191
Ahern v. Steele.....	115 N. Y. 203..... 520
Alexander v. Cauldwell.....	83 N. Y. 480, 485..... 362
Allen v. Glen Creamery Co.....	101 App. Div. 806..... 266
Allen v. Stevens.....	161 N. Y. 122..... 120, 121, 123, 129
Allen v. Strickland.....	100 N. C. 225..... 306
American Sugar Refining Co. v.	
Fancher.....	145 N. Y. 552..... 450
Amory v. Vreeland.....	125 App. Div. 850..... 164
Amsterdam El. Light Co. v. Rayher.....	43 App. Div. 602, 604..... 371
Anargyros v. Egyptian Cigarette Co.....	54 App. Div. 345..... 543
Anderson v. How.....	116 N. Y. 336..... 436
Andrews v. Shoppe.....	84 Maine, 170..... 355
Andriuszis v. Philadelphia & Reading	
Coal & Iron Co.....	148 App. Div. 607..... 924
Archer v. Archer.....	147 App. Div. 44, 929..... 918
Arkansas Smelting Co. v. Belden Co.....	127 U. S. 379..... 592
Arrow Steamship Co. v. Bennett.....	73 Hun, 81..... 157
Ash v. Purnell.....	32 N. Y. St. Repr. 306..... 567
Ashcroft v. Hammond.....	197 N. Y. 488..... 158, 159
Asphalt P. & C. Co. v. City of New	
York.....	69 Misc. Rep. 588..... 629
Asphalt P. & C. Co. v. City of New	
York, No. 1.....	149 App. Div. 632..... 626
Asphalt P. & C. Co. v. City of New	
York, No. 2.....	149 App. Div. 622..... 632-634
Atherton v. Atherton.....	155 N. Y. 129; 181 U. S. 155..... 452 453, 455-459
Atlantic Coast Line v. Riverside	
Mills.....	219 U. S. 186, 196, 200 et seq..... 384
Austin v. Wilson.....	83 N. Y. St. Repr. 508..... 842
 B.	
Bacon v. Chapman.....	85 App. Div. 809..... 277
Baird v. Daly.....	68 N. Y. 547, 551..... 368
Baisley v. Baisley.....	113 Mo. 544..... 439
Bangs v. National Macaroni Co.....	15 App. Div. 522..... 363
Bank of Auburn v. Roberts.....	44 N. Y. 192..... 67
Bank of Michigan v. Ely.....	17 Wend. 508..... 181
Bank of Monongahela Valley v.	
Weston	159 N. Y. 201
	363

TABLE OF CASES CITED.

PAGE.

Barney Estate Co. v. Palmer & Singer	
Mfg. Co.	68 Misc. Rep. 501; 143 App. Div. 906..... 140
Barring v. Corrie.....	2 Barn. & Ald. 187..... 537
Barson v. Mulligan.....	191 N. Y. 306, 321..... 214
Bartlett v. Gale.....	4 Paige, 508..... 339
Barton v. Speis.....	5 Hun, 60..... 337
Bassett v. Fish.....	75 N. Y. 303..... 530
Bassett v. French.....	155 N. Y. 46..... 806
Batchelor v. Hinkle.....	132 App. Div. 620; 140 id. 621, 625..... 910
Bates v. Ledgerwood Mfg. Co.	130 N. Y. 200, 205..... 314
Bates v. Salt Springs Nat. Bank.....	157 N. Y. 822..... 764
Bauer v. Dewey.....	56 App. Div. 67; revd., 186 N. Y. 402..... 174, 175
Baumler v. Wilm.....	136 App. Div. 857..... 42
Baxter v. Duren.....	29 Maine, 434..... 597
Bay City & E. Sag. R. R. Co. v. Austin.....	21 Mich. 390, 411..... 769, 770
Beal v. N. Y. C. & H. R. R. Co.	41 Hun, 172..... 742
Beck v. McLane.....	129 App. Div. 745; affd., 188 N. Y. 587..... 339
Becker v. McCrea.....	119 App. Div. 56; revd., 188 N. Y. 428..... 213
Beckwith v. City of New York.....	121 App. Div. 462..... 88
Beecher v. Schuback.....	4 Misc. Rep. 54..... 682
Behrer v. McMillan.....	114 App. Div. 450, 454; affd., sub nom. Behrer v. City & Suburban Homes Co., 191 N. Y. 530..... 764
Bell v. Josselyn.....	9 Gray, 307..... 886
Berry v. Schaad.....	50 App. Div. 132..... 31
Bibb v. Allen.....	149 U. S. 481..... 592, 599
Bieling v. City of Brooklyn.....	120 N. Y. 98, 105 et seq..... 520
Bird v. Merklee.....	144 N. Y. 544..... 128
Bishop v. Fose.....	27 Conn. 1..... 439
Bliss v. Johnson.....	94 N. Y. 235..... 210
Boehm v. Rich.....	13 Daly, 62..... 587
Boorman v. Atlantic & Pacific R. R. Co.	78 N. Y. 599..... 18
Born v. Schrenkeisen.....	110 N. Y. 55..... -
Bornmann v. Star Co.	174 N. Y. 212, 219..... -
Borough Const. Co. v. City of New York.....	200 N. Y. 157..... -
Bosi v. N. Y. Herald Co.	33 Misc. Rep. 622; affd., 58 App. Div. 619..... 157
Bossout v. Rome, W. & O. R. R. Co.	181 N. Y. 37..... 106
Bostwick v. Beach.....	105 N. Y. 661..... 841

TABLE OF CASES CITED.

xxxiii

PAGE.

Bosworth v. Allen.....	168 N. Y. 157.....	450	
Bowman v. Domestic & Foreign Missionary Society.....	182 N. Y. 494.....	121	
Boyce v. Edwards.....	4 Pet. 111.....	181	
Boyce v. New York City R. Co.....	126 App. Div. 248, 258.....	906	
Bradley v. Crane.....	201 N. Y. 14.....	179	
Bradley Fertilizer Co. v. South Pub. Co.....	17 N. Y. Supp. 587.....	843	
Brady v. City of New York.....	.....	828
Brainard v. County of Kings.....	155 N. Y. 538.....	682	
Brand v. Weir.....	27 Misc. Rep. 212, 214.....	384	
Brewster v. Silence.....	8 N. Y. 207.....	371	
Bridgeport Ins. Co. v. Wilson.....	84 N. Y. 275.....	81	
Brill v. Tuttle.....	81 N. Y. 454.....	179	
Broadway, etc., R. R. Co. v. Mayor, etc.....	49 Hun, 126.....	105	
Bronson v. Coffin.....	108 Mass. 175, 188.....	744	
Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.....	198 N. Y. 551.....	861	
Brown v. Mayor.....	66 N. Y. 385.....	567	
Brown v. Quintard.....	177 N. Y. 84.....	355	
Brown v. Reiman.....	48 App. Div. 295.....	576	
Brown v. Wittner.....	48 App. Div. 185.....	40	
Buchanan v. Belsey.....	65 App. Div. 58.....	488	
Bunyan v. Pearson.....	8 App. Div. 86.....	355	
Burchell v. Osborne.....	119 N. Y. 486.....	889	
Burks v. Bosso.....	180 N. Y. 841.....	889	
Burnham v. McQuesten.....	48 N. H. 446.....	743	
Bushby v. Berkeley.....	185 App. Div. 448.....	269	
Bushwick Savings Bank v. Traum.. Butler v. Village of Oxford.....	26 App. Div. 582; affd., 158 N. Y. 668.....	186 N. Y. 444.....	888
Butterfield v. Cowing.....	112 N. Y. 486.....	804	

C.

California Ins. Co. v. Union Com- press Co.....	188 U. S. 887, 422.....	644, 645
Camacho v. Hamilton Bank Note & Eng. Co.....	2 App. Div. 869.....	508
Campbell v. Coon.....	149 N. Y. 558.....	693
Canda v. Totten.....	157 N. Y. 281.....	465
Carlson v. Albert.....	117 App. Div. 886.....	266
Carter v. Board of Education.....	144 N. Y. 621.....	180
Casey v. Davis & Furber Machine Co.....	188 App. Div. 896, 897.....	879, 424
Cashman v. Reynolds.....	128 N. Y. 188.....	266
Cass Farm Co. v. Detroit.....	181 U. S. 894.....	804

TABLE OF CASES CITED.

	PAGE.	
Cassidy v. Brooklyn Daily Eagle....	46 N. Y. St. Repr. 334; revd., 138 N. Y. 239; 28 Court of Appeals Cases & Points, No. 208 (1898).....	158
Casterton v. Town of Vienna.....	163 N. Y. 368.....	847
Catt v. Catt.....	118 App. Div. 742, 750.....	128, 190
Central R. R. & B. Co. v. Ingram....	98 Ala. 394, 395.....	834
Chapman v. Barney.....	129 U. S. 677.....	164
Charlotte Iron Works v. American Exchange Nat. Bank.....	34 Hun, 26.....	595
Chase v. Chase.....	191 Mass. 556.....	848
Cheever v. Wilson.....	9 Wall. 108.....	456
Cherry v. Monro.....	2 Barb. Ch. 618.....	840
Chicago v. Taylor.....	125 U. S. 161.....	68
China Mutual Ins. Co. v. Force.....	142 N. Y. 90.....	905
Cincinnati Nat. Bank v. Tilden....	50 N. Y. St. Repr. 386; affd., 140 N. Y. 620.....	839
Citrone v. O'Rourke Engineering Construction Co.....	188 N. Y. 339.....	898
City of Buffalo v. Holloway.....	7 N. Y. 498.....	34
City of Geneva v. Henson.....	195 N. Y. 447.....	57
City of New York v. Dowd Lumber Co.....	135 App. Div. 244; 140 id. 358	102, 108
City of New York v. Knickerbocker Trust Co.....	104 App. Div. 228.....	104
City of New York v. Montague.....	68 Misc. Rep. 176; 145 App. Div. 172.....	476
City of New York v. Montague, No. 1.....	149 App. Div. 475.....	602
City of New York v. U. S. Trust Co.	116 App. Div. 349.....	477
City of Rochester v. Campbell.....	123 N. Y. 405.....	774
City of Rochester v. West.....	29 App. Div. 125; affd., 164 N. Y. 510.....	105
Clafin v. Meyer.....	75 N. Y. 260.....	793
Clapper v. Town of Waterford.....	181 N. Y. 382, 390.....	868
Clark v. Augustine.....	62 N. J. Eq. 689.....	451
Clark v. Buckmobile Co.....	107 App. Div. 120.....	879
Clark v. Levy.....	130 App. Div. 389.....	16, 464, 471
Clark v. N. Y. C. & H R. R. Co.	191 N. Y. 416, 420.....	895
Clews v. Jamieson.....	182 U. S. 461.....	600, 601
Coates v. Village of Nyack.....	127 App. Div. 158.....	88
Cobb v. Knapp.....	71 N. Y. 848.....	577
Coite v. Lynes.....	88 Conn. 109.....	886
Colburn v. Marsh.....	68 Hun, 269; affd., 144 N. Y. 657.	742
Coleman v. First National Bank of Elmira.....	53 N. Y. 388.....	576
Coleman v. People.....	58 N. Y. 555.....	875

TABLE OF CASES CITED.

xxxv

	PAGE.
Coloney v. Farrow.....	5 App. Div. 607..... 158, 159
Colonial City Traction Co. v. Kings- ton City R. R. Co.....	158 N. Y. 540..... 416
Congregation Beth Elohim v. Cen- tral Presbyterian Church.....	10 Abb. Pr. (N. S.) 484..... 329
Congregation Kehal Adath v. Uni- versal B. & C. Co.....	134 App. Div. 368..... 465
Conkling v. Weatherwax.....	181 N. Y. 258..... 277
Conlen v. Rizer.....	109 App. Div. 537..... 602
Conrow v. Little.....	115 N. Y. 387..... 577
Consolidated Ice Co. v. Mayor.....	58 App. Div. 260; affd., 166 N. Y. 92, 99..... 59, 60
Constitution Pub. Co. v. Way.....	94 Ga. 120..... 156
Continental Ins. Co. v. Reeve.....	135 App. Div. 737; appeal dis- missed, 198 N. Y. 595..... 837
Cook v. Warren.....	88 N. Y. 87..... 273
Cooke v. Eshelby.....	L. R. 12 App. Cas. 271.. 593, 595, 597
Cooke v. Metropolitan Street R. Co.	59 App. Div. 154..... 746
Coolidge v. Payson.....	2 Wheat. 66..... 181
Corbett v. Spring Garden Ins. Co....	155 N. Y. 389..... 870
Corcoran v. Village of Peekskill.....	108 N. Y. 151..... 368
Cossman v. Ballin.....	141 App. Div. 68..... 271
Coster v. Mayor, etc., of Albany.....	43 N. Y. 399..... 66
Cosulich v. Standard Oil Co.....	122 N. Y. 118..... 818, 821
Cotheal v. Talmage.....	9 N. Y. 551..... 103
Cowen v. Village of West Troy.....	48 Barb. 48..... 105
Cox v. Albany Brewing Co.....	24 N. Y. St. Repr. 942; 56 Hun, 489..... 502
Cox v. Paul.....	175 N. Y. 328..... 771, 772
Crane Co. v. Pneumatic Signal Co... .	94 App. Div. 53; affd., sub nom. Crane Co. v. Smythe, 182 N. Y. 545..... 763, 764
Crashley v. Press Pub. Co.	179 N. Y. 27..... 908
Creveling v. Wood.....	95 Penn. St. 152..... 615
Cronkhite v. Cronkhite.....	94 N. Y. 328..... 463
Cruikshank v. Gordon.....	118 N. Y. 178, 183..... 169, 238
Culhane v. N. Y. C. & H. R. R. Co.	60 N. Y. 183..... 219
Cunningham v. Glauber.....	133 App. Div. 10..... 631
Curry v. City of Buffalo.....	135 N. Y. 368..... 810
Curtis v. Rochester & Syracuse R. R. Co.....	18 N. Y. 534..... 821
Czarnowsky v. City of Rochester.....	55 App. Div. 388; affd., 165 N. Y. 649..... 847, 896
D.	
D'Jorko v. Berwind-White Coal Mining Co.....	281 Penn. St. 164..... 924
Dambmann v. Butterfield.....	15 Hun, 495..... 926
Dame v. Coffman.....	58 Ind. 840..... 876

TABLE OF CASES CITED.

	PAGE.
Darcy v. Brooklyn & N. Y. Ferry Co.	196 N. Y. 99.....
Darrow v. Cornell.....	12 App. Div. 604.....
Dart v. Laimbeer.....	107 N. Y. 664, 669.....
Davis v. Seattle Nat. Bank.....	19 Wash. 65.....
Davis v. Supreme Lodge, Knights of Honor	165 N. Y. 159.....
De Forest v. Jewett.....	88 N. Y. 264.....
Deeves & Son v. Manhattan Life Ins. Co.....	195 N. Y. 324.....
Delabarre v. McAlpin.....	101 App. Div. 468.....
Delafield v. Parish.....	25 N. Y. 9.....
Delafield v. Village of Westfield.....	41 App. Div. 24.....
Detroit v. Parker.....	181 U. S. 399.....
Di Stefano v. Peekskill Lighting & R. R. Co.....	107 App. Div. 298.....
Dickinson v. Tysen.....	125 App. Div. 735.....
Diefendorf v. Fenn.....	126 App. Div. 661.....
Dike v. Erie R. Co.....	45 N. Y. 118.....
Dinehart v. Wilson.....	15 Barb. 595.....
Dinkelpiel v. N. Y. Evening Journal Co.....	91 App. Div. 96.....
Distilled Spirits (The).....	11 Wall. 366, 367.....
Dobbins v. Brown.....	119 N. Y. 188.....
Dobie v. Armstrong.....	160 N. Y. 584.....
Dobschuetz v. Holliday.....	82 Ill. 371.....
Dohn v. Dawson.....	90 Hun, 271.....
Dougherty v. Milliken.....	168 N. Y. 527, 532.....
Dougherty v. Weeks & Son.....	126 App. Div. 786, 789.....
Douglass v. Howland.....	24 Wend. 35.....
Droege v. Ahrens & Ott Mfg. Co.....	168 N. Y. 466.....
Dudley v. Chicago, M. & St. P. R. R. Co.....	58 W. Va. 604, 607.....
Duffy v. Williams.....	71 App. Div. 110.....
Dumar v. Witherbee, Sherman & Co.	88 App. Div. 181.....
Dunn v. Morgenthau.....	73 App. Div. 147; affd., 175 N. Y. 518.....
Dutton & Co. v. Cupples.....	117 App. Div. 172.....
E.	
Edgerton v. N. Y. & H. R. R. Co....	89 N. Y. 227.....
Egerer v. N. Y. C. & H. R. R. Co.	130 N. Y. 108, 113.....
Elias v. Schweyer.....	13 App. Div. 836.....
Elliott v. Guardian Trust Co.....	204 N. Y. 212.....
Erie R. R. Co. v. Steward.....	170 N. Y. 172.....
Erving v. Mayor, etc.....	181 N. Y. 183.....
Eten v. Luyster.....	60 N. Y. 252, 259.....
Excelsior Terra Cotta Co. v. Harde..	181 N. Y. 11.....

TABLE OF CASES CITED.

xxxvii

F.	PAGE.	
Fahr v. Manhattan R. Co.	9 Misc. Rep. 57.....	737
Farrell v. Farrell.	142 App. Div. 605.....	903
Fearing v. Irwin.	55 N. Y. 486.....	66
Fink v. Fink.	171 N. Y. 616, 623.....	870
First Presbyterian Church v. Mc-Kallor.	35 App. Div. 98.....	128
Firth v. Rehfeldt.	30 App. Div. 326; affd., N. Y. 588.....	164 682
Fischer v. Blank.	183 N. Y. 244.....	543
Fleming v. Brook.	Schoales & L. 318.....	355
Fletcher v. Fuller.	120 U. S. 584.....	208
Flynn v. Joline.	135 App. Div. 291.....	945
Fogarty v. Fogarty, No. 1.	128 App. Div. 273.....	484
Foley v. N. Y. C. & H. R. R. R. Co.	197 N. Y. 430.....	219
Foedick v. Town of Hempstead.	125 N. Y. 581, 595.....	128
Fourth Street Bank v. Yardley.	165 U. S. 684.....	184
Fowler v. Bowery Savings Bank.	118 N. Y. 450.....	577
Fox v. Davidson.	111 App. Div. 174.....	88
Fox v. Erie Preserving Co.	93 N. Y. 54.....	165
Fox v. Rural Home Co.	90 Hun, 365; affd., 157 N. Y. 684.....	858
Fraenkel v. Friedmann.	199 N. Y. 351.....	86
Franklin v. Hoadley.	116 App. Div. 588; 126 id. 687; 145 id. 238.....	679
Freibaum v. Brady.	143 App. Div. 220.....	379
French v. Barber Asphalt Paving Co.	181 U. S. 824.....	894
French v. French.	2 M. & G. 644.....	843
Freudenheim v. Gütter.	201 N. Y. 94.....	473
Friede v. Weissenthanner.	27 Misc. Rep. 518.....	548
Fulton Bank v. N. Y. & Sharon Canal Co.	4 Paige, 127.....	686

G.

Gallagher v. Gallagher.	185 App. Div. 457; affd., N. Y. 572.....	485
Gallagher v. Reilly.	81 N. Y. St. Repr. 556.....	567
Galusha v. Galusha.	116 N. Y. 685.....	568
Garnhart v. Rentchler.	72 Ill. 585.....	614
Gates v. Bowers.	169 N. Y. 14, 17.....	340
Gegan v. Union Trust Co.	129 App. Div. 184; affd., N. Y. 541.....	188 37
Geleta v. Buffalo & Niagara Falls Railway.	88 App. Div. 372; affd., N. Y. 524.....	898
Germania National Bank v. Taaks.	101 N. Y. 442.....	181
Gerould v. Cronk.	85 Hun, 500.....	371

TABLE OF CASES CITED.

	PAGE
Getty v. Town of Hamlin	127 N. Y. 636.....
Gibson v. Erie R. Co.....	63 N. Y. 449.....
Gibson v. Sun Printing & Pub. Assn.	71 App. Div. 566, 569.....
Gihon v. Albert	7 Paige, 278.....
Giles v. Austin	62 N. Y. 486.....
Gillender v. City of New York.....	127 App. Div. 612.....
Gillet v. Bank of America.....	180 N. Y. 549, 555.....
Gittleman v. Feltman.....	191 N. Y. 205.....
Glenn v. Garth.....	183 N. Y. 18.....
Glor v. Kelly.....	49 App. Div. 617, 619; <i>affd.</i> 844 U. S. 608 N. Y. 589.....
Goldman v. Swartwout.....	117 App. Div. 185, 188.....
Gordon v. Ashley.....	191 N. Y. 186.....
Gorlitzer v. Wolffberg.....	149 App. Div. 916.....
Gorton Steamer Co. v. Spofford....	5 Civ. Proc. Rep. 116.....
Gould v. Moring.....	28 Barb. 444.....
Gould v. Weed.....	12 Wend. 12.....
Govin v. De Miranda.....	140 N. Y. 474.....
Gow v. Ward.....	144 App. Div. 598.....
Grafton v. Brigham.....	70 Hun, 184.....
Gray v. Gray.....	143 N. Y. 854.....
Greany v. Long Island R. R. Co....	101 N. Y. 419.....
Greele v. Parker.....	5 Wend. 414.....
Green v. Dunlop.....	186 App. Div. 116, 120.....
Greene v. White.....	87 N. Y. 405, 407.....
Gregg v. Sumner.....	21 Ill. App. 110.....
Gressman v. Morning Journal Assn.	197 N. Y. 474.....
Griffen v. Manice.....	166 N. Y. 188, 194.....
Griffin v. Interurban Street R. Co..	179 N. Y. 488; 180 id. 588 ... 767, 771 772
Guernsey v. Rexford.....	63 N. Y. 631.....
Guest v. City of Brooklyn.....	69 N. Y. 506.....
Guldseth v. Carlin.....	19 App. Div. 588.....
Gundling v. Chicago.....	177 U. S. 188, 188.....

H.

Haddock v. Haddock.....	201 U. S. 562.....
Haft v. First Nat. Bank.....	458, 456, 457 19 App. Div. 425.....
Hagan v. Scottish Ins. Co.....	186 U. S. 423.....
Hagan v. Sone.....	174 N. Y. 817.....
Ham v. Mayor.....	70 N. Y. 459
Hamilton v. City of Buffalo.....	178 N. Y. 72.....
Hamm v. Prudential Ins. Co.....	187 App. Div. 504.....
Hammond v. Hammond.....	108 App. Div. 437.....
Hammond v. Zehner.....	21 N. Y. 118.....
Harker v. Edwards.....	(1887) 57 L. J. (N. S.) 147.....
Harmon v. Vanderbilt Hotel Co.....	79 Hun, 392; <i>affd.</i> , 148 N. Y. 665.....

TABLE OF CASES CITED.

xxxix

	PAGE.
Harrington v. Stillman	120 App. Div. 659..... 468
Harrison v. Bevington	30 Eng. C. L. 975..... 156
Haskell v. Osborn	38 App. Div. 128..... 941
Haughian v. Conlan	86 App. Div. 290..... 487
Havemeyer v. City of New York	136 App. Div. 981..... 492
Havemeyer v. Fuller	10 Abb. N. C. 9..... 156
Hawkins v. Mapes-Reeve Construction Co.	82 App. Div. 72; affd., 178 N. Y. 236, 241..... 726, 729
Hawley v. Keeler	53 N. Y. 114..... 648
Hays v. Hathorn	74 N. Y. 486..... 20
Hayward v. Hood	44 Hun, 128..... 245
Heath v. Koch	74 App. Div. 338; affd., 173 N. Y. 629..... 487
Hein v. Honduras Syndicate	198 App. Div. 786..... 271
Hemmens v. Nelson	188 N. Y. 517, 528..... 158
Henderson Bridge Co. v. McGrath	134 U. S. 260..... 328
Henry v. Allen	151 N. Y. 1..... 861
Henry v. City of New York	119 App. Div. 482..... 480
Henry v. Hudson & Manhattan R. R. Co.	201 N. Y. 140, 142..... 894
Henry v. Salisbury	83 App. Div. 298..... 548
Hey v. Collman	78 App. Div. 584; affd., 180 N. Y. 560..... 742
Heywood v. Doherty	121 N. Y. Supp. 610..... 551
Higbie v. Board of Education	122 App. Div. 488..... 520
Higgins v. Moore	84 N. Y. 417..... 345
Higgins v. Western Union Telegraph Co.	156 N. Y. 75..... 878, 523
Hine v. Hine	118 App. Div. 585..... 808
Hintze v. New York Central & H. R. R. Co.	140 App. Div. 852..... 217
Hoey v. New York Times Co.	188 App. Div. 149..... 171
Hogan v. Manhattan R. Co.	149 N. Y. 28..... 427
Hogan v. Shorb	24 Wend. 458..... 595
Holland v. Alecock	108 N. Y. 812..... 180
Holmes v. Jones	147 N. Y. 59..... 168
Home Ina. Co. v. Baltimore Warehouse Co.	98 U. S. 527, 548..... 644, 645
Hood v. Hood	110 Mass. 468, 465..... 260
Hope v. Brewer	186 N. Y. 138..... 128
Hope v. Lawrence	50 Barb. 258..... 344
Morowitz v. Goodman	112 App. Div. 18..... 245
Morton v. Morgan	19 N. Y. 170..... 592
Morton v. N. Y. C. & H. R. R. Co.	12 Abb. N. C. 30; affd., 103 N. Y. 697..... 141
otel Register Co. v. Osborne	84 App. Div. 307..... 484
umphrey v. Lucas	2 Car. & K. 151, 152..... 598, 600

TABLE OF CASES CITED.

	PAGE.	
Humphries v. Parker.....	52 Maine, 502.....	873
Humphries v. Smith.....	5 Ga. App. 340.....	615
Hunt v. Hunt.....	72 N. Y. 217.....	456
Husted v. Thomson.....	7 App. Div. 66; affd., 158 N. Y. 828.....	18
I.		
Iesief v. N. Y. C. & H. R. R. Co..	102 App. Div. 168.....	821
Indelli v. Lesster.....	130 App. Div. 548.....	469
Inhabitants of Gloucester v. Beach..	2 Pick. 59.....	743
Iron Dyke Copper Mining Co. v. Iron Dyke R. R. Co.....	132 Fed. Rep. 208.....	439
Ivison v. Ivison.....	80 App. Div. 599.....	490
J.		
Jackson v. Paterno.....	128 App. Div. 474.....	8
Jacocks v. Morrison.....	129 App. Div. 285.....	560
Jacquith v. Hudson.....	5 Mich. 128, 187.....	275
Jaffray v. Krauss.....	79 Hun, 449.....	686
James v. Signell.....	60 App. Div. 75.....	941
Jamestown Business College Assn. v. Allen.....	172 N. Y. 291, 294.....	293
Johnson v. Aleshire.....	180 App. Div. 178.....	202
Johnson v. Johnson.....	14 Wend. 687.....	808
Jones v. Gould, No. 2.....	123 App. Div. 236.....	374
Jones v. Rochester Gas & Electric Co.....	168 N. Y. 65.....	767
Jones v. Rochester Gas & Electric Co., No. 2.....	7 App. Div. 474; affd., 158 N. Y. 678.....	767
Jones v. Ryan.....	125 App. Div. 282.....	42
Judson v. Stilwell.....	26 How. Pr. 518.....	597
K.		
Kane Co. v. Kinney.....	174 N. Y. 69, 75.....	763, 764
Kaughran v. Kaughran.....	78 App. Div. 150.....	266
Keller v. American Bottlers' Pub. Co.....	140 App. Div. 811.....	158, 168
Kellogg v. Church Charity Founda- tion.....	208 N. Y. 191.....	380
Kellum v. Mission of Immaculate Virgin.....	82 App. Div. 528; 129 id. 921....	204
Kelsey v. Sargent.....	100 N. Y. 602.....	270
Kemble & Mills v. Kaighn.....	181 App. Div. 68.....	157
Kemp v. Knickerbocker Ice Co.....	69 N. Y. 45, 58.....	275
Kendall v. Stone.....	5 N. Y. 14.....	16, 17
Kennedy v. Press Pub. Co.	41 Hun, 422.....	157
Kenney v. Apgar.....	98 N. Y. 589.....	477

TABLE OF CASES CITED.

xli

	PAGE.
Kenney v. Wallace.....	24 Hun, 478.....
Keogh v. McManus	34 Hun, 521.....
Ketchum v. Herrington.....	45 N. Y. St. Repr. 59.....
Keuthen v. Elder.....	129 App. Div. 921.....
Kiff v. Youmans.....	86 N. Y. 324.....
Kilburn v. Adams.....	7 Metc. 88.....
King, The, v. Higgins.....	2 East, 5.....
King v. Mayor, etc.....	102 N. Y. 171.....
Kings County Fire Ins. Co. v. Stevens.....	101 N. Y. 411.....
Kingisbury v. Moses.....	45 N. H. 222.....
Kirby v. Montgomery Brothers & Co.....	197 N. Y. 27, 31.....
Klinck v. Colby.....	46 N. Y. 427.....
Knapp v. Simon.....	96 N. Y. 284.....
Knezevich v. Bush Terminal Co.....	127 App. Div. 54.....
Knickerbocker v. People.....	48 N. Y. 177.....
Knox v. Eden Musee Co.....	148 N. Y. 441.....
Koenig v. Richter.....	8 T. & F. 413.....
Kranz v. Long Island R. Co.....	128 N. Y. 1.....
Krug v. Pitass.....	162 N. Y. 154, 159.....
Kutner v. Fargo.....	84 App. Div. 317.....

L.

Lake v. Lake.....	136 App. Div. 47.....	563
Langdon v. Mayor, etc.....	93 N. Y. 129, 149.....	59
Lanpher v. Clark.....	149 N. Y. 473.....	162
Lapham v. Rice.....	68 Barb. 485, 498.....	371
Lashinsky v. Silverman.....	48 Misc. Rep. 501.....	199
Latimer v. McKinnon, No. 1.....	85 App. Div. 224.....	245
Lauer v. Dunn.....	115 N. Y. 405.....	764
Leaughton v. Bishop of Sodor & Man.....	L. R. 4 P. C. (1871-1873) 495, 505.	159
Law v. McDonald.....	9 Hun, 28.....	742
Lawrence v. Fox.....	20 N. Y. 268.....	801
Lawrence v. Maxwell.....	58 N. Y. 19.....	599
Lawrence v. Norton.....	116 App. Div. 896.....	202
Lawson v. Hogan.....	93 N. Y. 89.....	85
Lawson v. Merrall.....	69 Hun, 278.....	822
Le Marchant v. Moore.....	150 N. Y. 209.....	577, 596
Le Massena v. Storm.....	62 App. Div. 150, 153.....	157, 238
Leary v. Albany Brewing Co.....	77 App. Div. 6, 10.....	866
Lee v. Atlantic Coast Line R. Co....	150 Fed. Rep. 775.....	532
Lee v. Brown.....	142 App. Div. 933.....	249
Lee v. Woolsey.....	19 Johns. 319.....	158, 162
Leidenthal v. Leidenthal.....	121 App. Div. 269.....	202
Lent v. N. Y. & M. R. Co.....	130 N. Y. 504, 510.....	277
Lentino v. Port Henry Iron Ore Co..	71 App. Div. 466.....	831

TABLE OF CASES CITED.

	PAGE.
Leo v. McCormack	186 N. Y. 380..... 593, 598, 600
Letherby v. Shaver	73 Mich. 500..... 489
Levy v. Brush	45 N. Y. 589..... 463
Lewin v. Lehigh Valley R. R. Co.	169 N. Y. 386..... 806
Lieberman v. First Nat. Bank	2 Pa. (Del.) 416; 48 L. R. A. 514 451
Lightfoot v. Davis	198 N. Y. 261..... 449, 450
Linehan v. Cambridge	109 Mass. 212..... 494
Liverpool Steam Co. v. Phenix Ins. Co.	129 U. S. 397, 447..... 905
Loewer's Gambrinus Brewing Co. v. Lithauer	48 Misc. Rep. 688..... 81
Looff v. Lawton	97 N. Y. 478, 488..... 285
Loper v. Wading River Realty Co.	143 App. Div. 167..... 960
Lopez v. Campbell	183 N. Y. 340..... 361
Lord v. United States Transportation Co.	143 App. Div. 437, 451..... 866
Louda v. Revillon	99 App. Div. 481..... 269
Ludwig & One v. Cramer	58 Wis. 198..... 156
Lynch v. Elektron Mfg. Co.	94 App. Div. 408..... 248
Lynch v. Lyons	181 App. Div. 120..... 277

M.

Mack Paving Co. v. City of New York	142 App. Div. 702..... 690
Maders v. Whallon	74 Hun, 372, 376..... 859
Madison Ave. Baptist Church v. Baptist Church in Oliver St.	46 N. Y. 181, 141..... 828
Madison Ave. Baptist Church v. Oliver St. Baptist Church	73 N. Y. 82, 94..... 214
Madison Square Bank v. Pierce	187 N. Y. 444..... 19
Maglio v. New York Herald Co.	88 App. Div. 44; 98 id. 546..... 157
Maisch v. City of New York	193 N. Y. 460..... 494
Maneely v. City of New York	119 App. Div. 876, 890..... 727
Manhard Hardware Co. v. Rothschild	121 Mich. 657..... 165
Manley v. Fiske	139 App. Div. 665; affd., 201 N. Y. 546..... 124
Mann v. Mann	14 Johns. 1, affg. 1 Johns. Ch. 231..... 855
Marie v. Garrison	83 N. Y. 14..... 264
Marlin Fire Arms Co. v. Shields	171 N. Y. 384, 390..... 157
Martens v. Sloane	132 App. Div. 114..... 9
Martin v. Insurance Co.	148 N. Y. 117..... 264
Marx v. Brogan	188 N. Y. 481..... 179
Marx v. McGlynn	88 N. Y. 357..... 487
Marx v. Press Publishing Co.	184 N. Y. 561..... 169
Mason v. Hunt	1 Doug. 297..... 181
Matter of Bankers Investing Co.	141 App. Div. 591..... 691
Matter of Beauty Spring Water Co.	184 App. Div. 17; affd., 198 N. Y. 418..... 418, 419

TABLE OF CASES CITED.

xliii

	PAGE.
Matter of Bills of Lading.....	14 I. C. C. Rep. 846..... 834
Matter of Blumberg, No. 1.....	149 App. Div. 308..... 926
Matter of Blumberg, No. 2.....	149 App. Div. 926..... 304
Matter of City of New York (Briggs Avenue).....	118 App. Div. 224..... 981
Matter of City of New York (Church Avenue).....	91 App. Div. 558..... 820, 821
Matter of City of New York (East 138th St.).....	127 App. Div. 672, 675, 676..... 895
Matter of City of New York (Hawkinstone Street).....	187 App. Div. 680; affd., 199 N. Y. 587..... 981
Matter of City of New York (West 151st St.).....	183 App. Div. 867..... 64, 66
Matter of City of Yonkers.....	117 N. Y. 584..... 57
Matter of Coleman.....	174 N. Y. 878..... 800
Matter of Fay.....	174 N. Y. 526..... 494
Matter of Flaherty v. Milliken.....	198 N. Y. 587..... 588
Matter of Gabriel.....	44 App. Div. 628; affd., 161 N. Y. 644..... 281
Matter of Greene.....	9 App. Div. 228..... 96
Matter of Greenwich & Johnsonville R. Co. v. G. & S. Railroad.....	172 N. Y. 462..... 414, 415
Matter of Griffin.....	167 N. Y. 71, 81..... 121, 128
Matter of Harnett.....	15 N. Y. St. Repr. 725..... 281
Matter of Healey.....	53 Vt. 894..... 439
Matter of Hines.....	141 App. Div. 569..... 75
Matter of Hoffman.....	201 N. Y. 247..... 899
Matter of Hopper v. Britt.....	208 N. Y. 144..... 97
Matter of Husa.....	126 N. Y. 587..... 128
Matter of Jackson Steinway Co. v. Prendergast.....	142 App. Div. 905..... 621
Matter of Kelly v. Van Wyck.....	35 Misc. Rep. 210..... 291
Matter of Kenyon.....	156 Fed. Rep. 868..... 808
Matter of Latimer v. Herzog Telephone Co.....	75 App. Div. 523..... 827
Matter of Long Island L. & T. Co.....	92 App. Div. 5..... 281, 351, 355
Matter of Lowe.....	78 Misc. Rep. 178..... 351
Matter of Marlor.....	121 App. Div. 398..... 487
Matter of Martin.....	98 N. Y. 198..... 490
Matter of Mayor.....	28 App. Div. 148..... 64
Matter of Mayor, etc. (Grote Street).....	139 App. Div. 69..... 64
Matter of Mayor, etc. (Walton Ave.).	181 App. Div. 696; affd., 197 N. Y. 518..... 64
Matter of Melon Street.....	182 Penn. St. 397..... 68
Matter of Murphy.....	126 App. Div. 58..... 70, 75, 80
Matter of New York Central & H. R. R. R. Co.....	77 N. Y. 248..... 416, 417

TABLE OF CASES CITED.

	PAGE
Matter of New York Central & H. R.	
R. R. Co. v. Met. Gas Light Co....	63 N. Y. 336..... 416
Matter of New York & Harlem R. R.	
Co. v. Kip.....	46 N. Y. 546..... 416
Matter of New York, Lackawanna	
& Western R. R. Co.....	33 Hun, 148, 154; affd., 98 N. Y. 664..... 416
Matter of People's R. R. Co.	
112 N. Y. 578, 584..... 417	
Matter of Reynolds.	
124 N. Y. 888..... 851, 855	
Matter of Richard Street.	
188 App. Div. 821..... 64	
Matter of Richardson.	
187 App. Div. 108..... 924	
Matter of Robinson.	
203 N. Y. 380..... 128	
Matter of Rochester Elec. R. Co.	
123 N. Y. 851..... 416	
Matter of Rutledge.	
162 N. Y. 81..... 280	
Matter of Sloane.	
154 N. Y. 109..... 430	
Matter of Snelling.	
136 N. Y. 515..... 487	
Matter of Sturgis.	
184 N. Y. 485..... 128	
Matter of Sugden v. Partridge.	
174 N. Y. 87..... 494	
Matter of Sullivan.	
31 Misc. Rep. 1; affd., 58 App. Div. 637..... 806	
Matter of Taylor.	
117 App. Div. 348..... 827	
Matter of Tiffany.	
179 N. Y. 455..... 847, 896	
Matter of Tompkins.	
69 App. Div. 474..... 924	
Matter of Towne v. Porter.	
128 App. Div. 717..... 286, 287	
Matter of Turner.	
143 App. Div. 645..... 946	
Matter of Vanderbilt.	
127 App. Div. 408..... 546	
Matter of Village of Olean v. Stey-	
ner.....	185 N. Y. 841..... 57
Matter of Welling.	
51 App. Div. 355..... 280	
Matter of Wise.	
108 App. Div. 52..... 97	
Matthews v. Tufts.	
87 N. Y. 568..... 439	
May v. Berlin Iron Bridge Co.	
43 App. Div. 569..... 822	
Maynard v. Beardsley.	
7 Wend. 560, 561..... 159, 162	
Mayor, etc., v. Manhattan R. Co.	
148 N. Y. 1, 26..... 757	
McCabe v. Farm Buildings Fire Ins.	
Co.....	14 Hun, 602..... 636
McCargo v. Jergens.	
185 App. Div. 921; appeal dis- missed, 198 N. Y. 551..... 540	
McCartee v. Orphan Asylum Society.	
9 Cow. 437..... 896	
McCorkle v. Herman.	
117 N. Y. 297..... 764	
McCray v. United States.	
195 U. S. 27, 64..... 888	
McDonald v. Metropolitan St. R. Co.	
167 N. Y. 66..... 488	
McGuinness v. Allison Realty Co....	
46 Misc. Rep. 8, 12; affd., 111 App. Div. 926..... 829	
McKean v. National Life Association.	
24 Misc. Rep. 511..... 548	
McLachlin v. Brett	
105 N. Y. 391..... 595	
McNeil v. Tenth National Bank.....	
46 N. Y. 825..... 702-705	
Mears v. N. Y., N. H. & H. R. R. Co.	
75 Conn. 171..... 834	

TABLE OF CASES CITED.

xlv

PAGE.

Mellor v. Philadelphia	160 Penn. St. 614.....	68
Merchants' Bank v. Griswold	72 N. Y. 472.....	181
Merritt v. Village of Portchester	71 N. Y. 309, 311	307
Metropolitan Board of Works v. McCarthy	L. R. 7 H. L. Cas. 248.....	67
Metropolitan Life Ins. Co. v. Standard National Bank	44 App. Div. 319.....	451
Metropolitan Trust Co. v. Tonawanda, etc., R. R. Co.	43 Hun, 521; affd., 106 N. Y. 673. 477	
Miller v. Garlock	8 Barb. 158.....	742
Milliken Brothers, Inc., v. City of New York	201 N. Y. 65, 74.....	726, 728
Minnich v. Packard	85 N. E. Rep. (Ind. Ct. App.) 787	489
Mission of Immaculate Virgin v. Cronin	143 N. Y. 524, 527.....	204, 209, 210
Missouri, K. & T. R. Co. v. Watson ..	74 Kan. 494; 14 L. R. A. (N. S.) 592.....	742
Mitchell, Schiller & Barnes v. Follett Time R. Co.	142 App. Div. 687.....	273
Moest v. City of Buffalo	116 App. Div. 657; affd., 198 N. Y. 615.....	520
Moffett, Hodgkins, etc., Co. v. Rochester	178 U. S. 373.....	102, 108
Moller v. Moller	115 N. Y. 466.....	733
Moller v. Tuska	87 N. Y. 166.....	808
Molloy v. City of New Rochelle	198 N. Y. 402.....	107
Molloy v. Village of Briarcliff Manor ,	145 App. Div. 491.....	919
Molms v. Pabst Brewing Co.	98 Wis. 158.....	451
Moore v. Francis	121 N. Y. 199.....	238
Moore v. Gadsden	93 N. Y. 12.....	774
Moore v. Metropolitan Nat. Bank ...	55 N. Y. 48.....	705
Moore v. Mfrs. Nat. Bank	123 N. Y. 425, 426.....	158, 159
Moore v. Reinhardt	132 App. Div. 707.....	289, 484
Moore v. Vulcanite Portland Cement Co.	121 App. Div. 667.....	592
Morrison v. Richardson	194 Mass. 370	103
Morrow v. Dudley	144 Fed. Rep. 441.....	439
Morton v. Tucker	145 N. Y. 244.....	725, 727
Mosler Safe Co. v. Maiden Lane S. D. Co.	199 N. Y. 479.....	87, 276
Motey v. Pickle Marble & Granite Co.	74 Fed. Rep. 155, 159.....	368
Mount v. Tuttle	188 N. Y. 358, 366.....	122, 125, 130
Muhlens v. Obermeyer & Liebmann .	83 App. Div. 88.....	821
Mullen v. Sanborn	79 Md. 364; 25 L. R. A. 721.....	439
Mullen v. St. John	57 N. Y. 567.....	821
Mullin v. Genesee Co. El. L. P. & Gas Co.	202 N. Y. 275, 276 et seq.....	394

	PAGE.	
Munich Assurance Co. v. Dodwell & Co.	128 Fed. Rep. 410; certiorari to U. S. Supreme Court refused, 195 U. S. 629.....	648
Murdock v. Mills	11 Metc. 5.....	181
Murray v. Miller, No. 1	85 App. Div. 414; affd., 178 N. Y. 816.....	130
Mutual Reserve Fund Life Assn. v. Spectator Co.	50 N. Y. Super. Ct. 400.....	157
N.		
Nappa v. Erie R. R. Co.	195 N. Y. 176, 182.....	393
Nash v. Thousand Island Steamboat Co.	128 App. Div. 148.....	231
Nathan v. Woolverton	69 Misc. Rep. 425; affd., 147 App. Div. 908.....	792
National Bank v. Navassa Phosphate Co.	56 Hun, 186.....	863
National Bank of Deposit v. Rogers	166 N. Y. 380.....	859
National Exchange Bank v. McFarlan	18 N. Y. Supp. 202; 59 Hun, 618.	679
National Park Bank v. German-American Mutual Warehousing & S. Co.	116 N. Y. 281.....	358
National Wall Paper Co. v. A. M. M. Fire Ins. Co.	175 N. Y. 226, 228.....	868, 870
Netograph Mfg. Co. v. Serugham	197 N. Y. 377.....	440
New York Central & H. R. R. R. Co. v. Aldridge	135 N. Y. 88.....	895
New York Central & Hudson River R. R. Co. v. Auburn Interurban Electric R. R. Co.	178 N. Y. 75.....	414
New York Central & H. R. R. R. Co. v. Village of Ossining	141 App. Div. 765.....	743
Newton v. Porter	69 N. Y. 138.....	450
Nicholls v. Wentworth	100 N. Y. 455.....	742
Nichols v. Martin	35 Hun, 168.....	595
Nickalls v. Merry	L. R. 7 H. L. (Eng. & Ir. App. Cas.) 830.....	593
Nickel v. Ayer	141 App. Div. 576.....	271
Nicoll v. N. Y. & E. R. R. Co.	12 N. Y. 121.....	742
Noonan v. Orton	32 Wis. 106.....	156
North River Bank v. Aymar	8 Hill, 262.....	686
Northern Pacific Railway v. Townsend	190 U. S. 267.....	742
Northern Pacific R. Co. v. Ely	197 U. S. 1.....	742
Norton v. Coons	6 N. Y. 38.....	294
Norwood v. Baker	172 U. S. 269.....	894
Noyes v. Anderson	124 N. Y. 175.....	142

TABLE OF CASES CITED.

xlvii

O.	PAGE.
O'Connell v. Clark.....	22 App. Div. 466..... 893
O'Keeffe v. City of New York.....	173 N. Y. 474..... 630
O'Reilly v. Mahoney.....	128 App. Div. 275..... 88
O'Rourke v. Waite Co.....	125 App. Div. 825..... 738
Oakes v. Star Co.....	119 App. Div. 358..... 269
Oldfield v. N. Y. & Harlem R. R. Co.	14 N. Y. 310..... 787
Olsen v. Singer Mfg. Co.....	188 App. Div. 467..... 901
Oppenheimer v. City of New York (Chelsea Bank).....	149 App. Div. 172..... 175, 176
Ormsby v. Dearborn.....	116 Mass. 386..... 803
Osborne v. Lawrence.....	9 Wend. 135..... 560
Osborne v. Seligman.....	89 Misc. Rep. 811..... 733
Osterheld v. Star Co.....	146 App. Div. 388..... 162, 168
Owens v. Missionary Society of M. E. Church	14 N. Y. 380..... 180
P.	
Pagnillo v. Mack Paving & Const. Co	142 App. Div. 491..... 84, 787
Pakas v. Hurley.....	146 App. Div. 746..... 909
Palmer Lumber Co. v. Stern.....	140 App. Div. 680..... 682
Parker v. Marco.....	136 N. Y. 585..... 440
Parsons v. Moses.....	40 App. Div. 58..... 727
Parsons v. N. Y. C. & H. R. R. R. Co.	113 N. Y. 355, 364..... 888
Payne v. Wilson.....	74 N. Y. 348..... 764
Peabody v. Satterlee.....	166 N. Y. 174..... 868, 870
Peet v. Fowler.....	170 Fed. Rep. 618..... 489
Pennyfeather v. Baltimore Steam Packet Co.....	58 Fed. Rep. 481..... 644, 645
People v. Arensberg.....	105 N. Y. 123..... 888, 891
People v. Biesecker.....	169 N. Y. 53, 56..... 888, 889
People v. Bowen.....	182 N. Y. 1..... 890
People v. Briggs.....	114 N. Y. 56..... 849
People v. Bush	4 Hill, 183..... 296, 297
People v. Corey.....	148 N. Y. 476, 494..... 875
People v. Donohue.....	114 App. Div. 880, 883..... 733
People v. Dooley.....	69 App. Div. 518; 171 N. Y. 84.. 291
People v. Georger.....	109 App. Div. 111..... 184
People v. Girard.....	145 N. Y. 105..... 888, 890, 891
People v. Grossman.....	168 N. Y. 47..... 875
People v. Hulett.....	15 N. Y. Supp. 680, 681..... 955
People v. Kathan.....	136 App. Div. 303, 311..... 876
People v. Kennedy	164 N. Y. 449..... 878
People v. Koerner.....	154 N. Y. 355..... 875
People v. Long Island R. R. Co.....	194 N. Y. 180..... 767, 769
People v. Marx.....	99 N. Y. 377..... 891

	PAGE.
People v. Mauch.....	24 How. Pr. 276..... 955
People v. McIntosh.....	5 N. Y. Cr. Rep. 88..... 849
People v. McLaughlin.....	150 N. Y. 365..... 183
People v. Meyer	8 N. Y. St. Repr. 256..... 849
People v. Molineux	168 N. Y. 293 et seq..... 875
People v. Murray.....	14 Cal. 159, 160..... 297
People v. Mutual Gaslight Co.....	74 N. Y. 434..... 498
People v. New York, C. & S. L. R. R. Co.....	129 N. Y. 474..... 532
People v. Richards.....	108 N. Y. 187..... 889
People v. Sherlock.....	166 N. Y. 180, 188..... 876
People v. Spencer.....	201 N. Y. 105..... 771
People v. West.....	106 N. Y. 298..... 890
People v. Wilson.....	151 N. Y. 408..... 876, 877
People ex rel. Babeock v. Murray....	70 N. Y. 521..... 290, 291
People ex rel. Balcom v. Mosher....	168 N. Y. 32, 40..... 290, 494
People ex rel. Barnes v. Court of Sessions.....	147 N. Y. 290..... 248
People ex rel. Beebe v. Warden of City Prison.....	89 N. Y. Supp. 823; affd., 86 App. Div. 626; 176 N. Y. 577..... 846 847, 849
People ex rel. Bolton v. Albertson...	55 N. Y. 50..... 494
People ex rel. Bush v. Houghton....	182 N. Y. 301..... 494
People ex rel. City of New York v. Bronx Bath Co.....	149 App. Div. 661..... 654
People ex rel. City of New York v. Goossen.....	149 App. Div. 660..... 654
People ex rel. City of New York v. Lyon.....	114 App. Div. 588..... 654
People ex rel. City of New York v. Olssen.....	149 App. Div. 662..... 654
People ex rel. City of New York v. Sandrock Realty Co.....	149 App. Div. 651..... 660-662
People ex rel. Coffey v. Democratic Committee.....	164 N. Y. 385..... 75
People ex rel. Coyle v. Martin.....	142 N. Y. 352, 356..... 784
People ex rel. Cross Co. v. Ahearn...	124 App. Div. 840..... 104
People ex rel. Deloughry v. Welles...	5 App. Div. 523..... 784
People ex rel. Kenny v. Bingham....	127 App. Div. 49..... 784
People ex rel. Kresser v. Fitzsimmons.	68 N. Y. 514..... 289-291
People ex rel. Lahey v. Partridge....	74 App. Div. 291..... 494
People ex rel. Lehman v. Consoli- dated Fire Alarm Co.....	142 App. Div. 753, 754..... 825
People ex rel. Lord v. Crooks.....	58 N. Y. 648..... 494
People ex rel. Massolles v. Hennessy.	74 Misc. Rep. 166..... 952
People ex rel. McCarren v. Dooling..	128 App. Div. 1; affd., 193 N. Y. 604..... 75

TABLE OF CASES CITED.

xlix

	PAGE.
People ex rel. Metropolitan St. R. Co.	
v. Tax Commissioners.....	174 N. Y. 417..... 494
People ex rel. Mills Water Works Co.	
v. Forrest.....	97 N. Y. 97, 100..... 421
People ex rel. New York Phonograph Co. v. Rice.....	57 Hun, 486; affd., 128 N. Y. 591. 582
People ex rel. Palmieri v. Marean....	86 App. Div. 278..... 248
People ex rel. Percival v. Cram.....	164 N. Y. 166..... 494
People ex rel. Price v. Warden, etc..	73 App. Div. 174..... 795
People ex rel. Reardon v. Partridge..	86 App. Div. 310..... 785
People ex rel. Roe v. Maclean.....	57 Hun, 141 784
People ex rel. Ryan v. Superintendent, etc.....	148 App. Div. 928..... 784
People ex rel. Third Ave. R. Co. v. Public Service Commission	208 N. Y. 299..... 414
People ex rel. Williamson v. McKinney	52 N. Y. 374..... 494
People ex rel. Winthrop v. Delany....	120 App. Div. 801; mod., 192 N. Y. 588..... 66
People ex rel. Young v. Stout.....	81 Hun, 886..... 905
People's Bank v. St. Anthony's R. C. Church.....	109 N. Y. 512, 528..... 862
Perry v. Dickerson.....	85 N. Y. 345..... 266
Person v. Grlier	66 N. Y. 124..... 439
Petty v. Emery	96 App. Div. 35..... 34
Phelps v. Mayor, etc.....	112 N. Y. 216..... 105
Pierce, Butler & Pierce Mfg. Co. v. Wilson.....	118 App. Div. 662, 664..... 727
Pierson v. Cronk.....	18 N. Y. St. Repr. 556..... 245
Plimpton v. Converse.....	44 Vt. 158..... 743
Pope v. Kelly.....	80 App. Div. 258..... 468
Pope v. Terre Haute Car & Manufacturing Co.	107 N. Y. 61..... 580
Porter v. Waring.....	69 N. Y. 250..... 104
Post v. Brooklyn Heights R. R. Co..	195 N. Y. 62..... 170
Pouch v. Prudential Ins. Co.....	146 App. Div. 612..... 609
Powers v. N. Y., Lake Erie & W. R. R. Co.....	96 N. Y. 274..... 528
Pratt v. Clark.....	124 App. Div. 248..... 925
Preusser v. Florence.....	4 Abb. N. C. 186..... 682
Price v. Holman.....	135 N. Y. 124..... 451
Price v. Palmer.....	28 Hun, 504..... 329
Prince v. Schlesinger.....	116 App. Div. 502..... 567
Providence Retreat v. City of Buffalo.....	29 App. Div. 160..... 896
Prym v. Peck & Mack Co.....	136 App. Div. 586, 588..... 249
Purdy v. City of New York.....	193 N. Y. 521..... 810

TABLE OF CASES CITED.

	PAGE.	
Putnam v. Boston & P. R. R. Co.....	182 Mass. 351.....	67
Putnam v. Longley.....	11 Pick. 487.....	306
Q.		
Quackenbush v. O'Hare.....	129 N. Y. 488.....	889, 840
Quigley v. Thatcher.....	144 App. Div. 710.....	751
Quinn v. Town of Sempronius.....	88 App. Div. 70.....	810
R.		
R. v. Langmead.....	L. & C. 427.....	877
Railroad Co. v. Georgia.....	98 U. S. 359.....	532
Randall v. Sweet.....	1 Den. 460.....	617
Rankin v. Bush.....	98 App. Div. 181.....	273
Rawson v. Leggett.....	184 N. Y. 504.....	436
Raymore Realty Co. v. Pfotenhauer-Nesbit Co.....	189 App. Div. 126.....	86
Read v. Bank of Attica.....	124 N. Y. 871.....	294
Reading Hardware Co. v. City of New York.....	129 App. Div. 292.....	86
Realty Associates v. Hoage.....	141 App. Div. 800.....	273
Reg. v. Meath.....	2 Ir. Rep. 21.....	306
Regina v. Ransford.....	18 Cox Crim. Cas. 9.....	297
Reichmann v. Manhattan Co.....	26 Hun, 488	498
Reilly v. Atlas Iron Construction Co.....	88 Hun, 196.....	427
Reining v. City of Buffalo.....	102 N. Y. 308.....	810
Reis v. City of New York.....	188 N. Y. 58.....	66, 67
Remmel v. Townsend.....	88 Hun, 353.....	576
Rende v. N. Y. & Texas Steamship Co.....	187 N. Y. 982.....	823
Reporters' Assn. v. Sun Printing & Publishing Assn.....	186 N. Y. 437.....	17, 157
Restein v. McCadden.....	166 Penn. St. 340.....	615
Reusens v. Arkenburgh.....	136 App. Div. 658.....	112
Rex v. Banks.....	12 Cox Crim. Cas. 893.....	297
Rex v. Krause.....	66 Just. Peace (1902), 121.....	298
Rex v. Smith.....	1 Ry. & Mood. 295.....	876
Reynolds v. Reynolds.....	48 Hun, 142.....	839
Rice v. Peters.....	128 App. Div. 776.....	339
Richardson v. Shaw.....	209 U. S. 865.....	593, 600
Richardson v. State.....	77 Ark. 321.....	849
Riesgo v. Glengariffe Realty Co.....	116 App. Div. 414, 419; affd., sub nom. Riesgo v. Clark, 194 N. Y. 600.....	858
Riggles v. Erney.....	154 U. S. 244.....	462, 466
Ringle v. Matthiessen.....	10 App. Div. 274; affd., 158 N. Y. 740.....	727, 728
Ringle v. Wallis Iron Works.....	85 Hun, 279; affd., 155 N. Y. 675.....	683
Rippley v. Frazer.....	69 Misc. Rep. 415.....	408

TABLE OF CASES CITED.

li

	PAGE.	
Ristau v. Coe Co.	120 App. Div. 478; affd., 198 N. Y. 630.....	198 821
Robb v. Washington & Jefferson College	108 App. Div. 827; affd., 185 N. Y. 485.....	185 128, 129
Roberge v. Bonner	185 N. Y. 265.....	550
Roberts v. Sioux City & Pacific R. R. Co.	78 Neb. 8; 2 L. R. A. (N. S.) 272.....	741
Roblee v. Town of Indian Lake	11 App. Div. 485.....	737
Roche v. Nason	185 N. Y. 188.....	808
Roehr v. Liebmann	9 App. Div. 247.....	871
Rohling v. Eich	23 App. Div. 179.....	775
Rosenstock v. Metzger	138 App. Div. 620.....	488
Rosenwald v. Hammerstein	12 Daly, 877.....	156
Rousseau v. Rouss	180 N. Y. 116.....	550
Rothchild v. Grand Trunk R. Co.	10 N. Y. Supp. 87.....	165
Rouse, Hazard & Co. v. Detroit	111 Mich. 251.....	165
Ruiz v. Renauld	100 N. Y. 256.....	181
Ryan v. Dox	84 N. Y. 807.....	468, 465
Ryan v. Murphy	116 App. Div. 242.....	928
S.		
Sanger v. Wood	8 Johns. Ch. 416.....	576
Sanitus Nut Food Co., Ltd., v. Force Food Co.	124 Fed. Rep. 302.....	165
Saner v. New York	206 U. S. 536; 180 N. Y. 27; 90 App. Div. 36.....	656, 659
Saunders v. N. Y. C. & H. R. R. Co.	144 N. Y. 75	895
Savage v. O'Neil	44 N. Y. 298.....	903
Sayles v. Best	140 N. Y. 368.....	918
Schall v. City of New York	88 App. Div. 64	480
Schapp v. Bloomer	181 N. Y. 125, 128.....	749
Scheer v. Long Island R. R. Co.	127 App. Div. 267.....	924
Schindler v. Welz & Zerweck	145 App. Div. 532.....	42
Schlappendorf v. American Railway Traffic Co.	142 App. Div. 554.....	822
Schmidt v. Simpson	204 N. Y. 484.....	473
Schmit v. Gillen	41 App. Div. 302.....	821
Schwer v. Martin	29 Ky. L. Rep. 1221.....	742
Scott v. Barker	129 App. Div. 241.....	487
Scott v. Hopkins	2 N. Y. St. Repr. 324.....	842
Scott v. Onderdonk	14 N. Y. 9.....	896
Seamans v. Barentsen	180 N. Y. 333.....	462
Seavey v. Potter	121 Mass. 297.....	808
Second Nat. Bank v. Weston	173 N. Y. 250.....	499
Segachneider v. Waring Hat Mfg. Co.	134 App. Div. 217.....	111
Seletsky v. Third Ave. R. R. Co.	44 App. Div. 632.....	602

TABLE OF CASES CITED.

	PAGE.	
Sexton v. Breese.....	135 N. Y. 387, 391.....	389
Seybolt v. N. Y., L. E. & W. R. R. Co.	95 N. Y. 562, 568.....	821
Seymour v. Judd.....	2 N. Y. 464.....	807
Sharp v. Dusenbury.....	2 Johns. Cas. 117.....	806
Shaver v. Western Union Tel. Co....	57 N. Y. 459.....	181
Shaw v. Feltman.....	99 App. Div. 514.....	278
Sherman v. Parish.....	53 N. Y. 488, 492	804
Shiell v. M'Nitt.....	9 Paige, 101.....	108
Ship v. Fridenberg.....	132 App. Div. 782.....	16
Simmons v. Ocean Causeway.....	21 App. Div. 30.....	86
Singleton v. Boone County Home Mut. Ins. Co.....	45 Mo. 250.....	870
Skaneateles Water Works Co. v. Vil- lage of Skaneateles.....	161 N. Y. 154.....	491
Skiff v. Stoddard.....	68 Conn. 198.....	592, 599
Skrymisher v. Northcote.....	1 Swanst. 566.....	899
Sloan v. Carolina Central R. R. Co...	36 S. E. Rep. 21.....	885
Smidt v. Bailey.....	132 App. Div. 177.....	271
Smith v. Anderson.....	126 App. Div. 24.....	271
Smith v. Bradstreet Co.....	134 App. Div. 567.....	271
Smith v. Laird.....	44 Hun, 580.....	266
Smith v. Savin.....	141 N. Y. 315.....	702
Smith v. Western Pacific R. Co.....	144 App. Div. 180; affd., 208 N. Y. 499.....	21
Smith v. Weston.....	159 N. Y. 194.....	868
Solar Baking Powder Co. v. Royal Baking Powder Co.....	128 App. Div. 553.....	54
Solarz v. Manhattan R. Co.....	8 Misc. Rep. 656; 11 id. 715; affd., 155 N. Y. 645.....	821
Southern Pacific Co. v. Hyatt.....	182 Cal. 240; 54 L. R. A. 522.....	748
Southern R. Co. v. Simpson.....	181 Fed. Rep. 705.....	368
Sparks v. Wakeley.....	7 Wkly. Dig. 80.....	545
Spence v. Ham.....	27 App. Div. 379; affd., 163 N. Y. 220.....	199
Spence v. Woods.....	134 App. Div. 182.....	274
Spencer v. Town of Sardinia.....	42 App. Div. 472.....	810
Springs v. James.....	137 App. Div. 110; affd., 202 N. Y. 608.....	592, 600
St. John v. Andrews Institute.....	117 App. Div. 698, 714.....	128-130
St. John v. Union Mutual Life Ins. Co.....	132 App. Div. 515.....	609
Stackpole v. Wray.....	99 App. Div. 262.....	822
Stall v. Wilbur.....	77 N. Y. 158.....	339
Standard Oil Co. v. Anderson.....	212 U. S. 222.....	880
Standard Varnish Works v. Haydock.	143 Fed. Rep. 818.....	808
Starer v. Stern.....	100 App. Div. 398.....	822
State v. Hodge.....	50 N. H. 510-517.....	876, 878
Steinhardt v. Bingham.....	183 N. Y. 339.....	806

TABLE OF CASES CITED.

liii

	PAGE.	
Sterling v. Sherwood	20 Johns. 204.....	162
Stevens v. Church	41 Conn. 869.....	889
Stevens v. Ogden	180 N. Y. 182.....	764
Stevenson v. Ward	48 App. Div. 291.....	159
Stewart v. Ferguson	184 N. Y. 558.....	821
Stilwell v. Barter	19 Wend. 487.....	162
Stokes v. Stokes	28 App. Div. 558.....	886
Stourbridge v. Brooklyn City R. R. Co.	9 App. Div. 129.....	393
Stover v. People	56 N. Y. 815.....	876
Strong v. Wales	50 Vt. 361.....	743
Stuart v. Press Publishing Co.	88 App. Div. 467, 474.....	159
Sunderlin v. Bradstreet	46 N. Y. 188.....	158
Sweetser v. Davis	26 App. Div. 398.....	803
Swift v. Bennett	10 Cush. 436.....	617
T.		
T. A. Vulcan v. Myers	189 N. Y. 864.....	543
Tallman v. Murphy	120 N. Y. 345.....	8
Talmadge v. R. & S. R. R. Co.	18 Barb. 498, 498.....	744
Taylor v. Bradley	89 N. Y. 129; 4 Abb. Ct. App. Dec. 366.....	399 280, 399
Taylor v. Church	1 E. D. Smith, 279; affd., 8 N. Y. 452.....	156
Taylor v. Enoch Morgan's Sons Co.	124 N. Y. 184.....	615
Taylor v. Goelet	142 App. Div. 467.....	86
Ten Eyck v. Holmes	3 Sandf. Ch. 428.....	180
Terry v. Munger	121 N. Y. 161.....	577, 803
Tew v. Wolfsohn	174 N. Y. 272.....	576
Thayer v. Thayer	145 App. Div. 268.....	912
Thomas v. Marshfield	18 Pick. 240, 248.....	744
Thompson v. Davenport	9 B. & C. 78.....	576
Thompson v. Ketcham	8 Johns. 148.....	294
Thomson-Houston El. Co. v. Durant Land Imp. Co.	144 N. Y. 84.....	229
Thrall v. Cuba Village	88 App. Div. 410.....	810
Throop Grain Cleaner Co. v. Smith	110 N. Y. 83.....	184
Thurston v. Thornton	1 Cush. 89.....	228
Tichnor Brothers, Inc., v. Barley	72 Misc. Rep. 688.....	872
Tobin v. Best Co.	120 App. Div. 887.....	156
Tonawanda v. Lyon	181 U. S. 889.....	894
Town Topic Pub. Co. v. Collier	114 App. Div. 191.....	157
Townsend v. Bissell	4 Hun. 297.....	742
Townsend v. Van Buskirk	22 App. Div. 441.....	457
Tremblay v. Harmony Mills	171 N. Y. 598.....	775
Tribune Assn. v. Sleeman	12 Civ. Proc. Rep. 20.....	489
Trieber v. New York & Queens Co. R. Co.	134 App. Div. 661; affd., 201 N. Y. 520.....	201 805

TABLE OF CASES CITED.

	PAGE.	
Triggs v. Sun Printing & Pub. Assn.	179 N. Y. 144, 158.....	171, 288
Trumbull v. Palmer	104 App. Div. 51.....	896
Trustees of East Hampton v. Vail ..	151 N. Y. 468, 470.....	856
Turner v. Howard	10 App. Div. 555.....	927
Tuson v. Evans	12 Ad. & El. 788.....	158
Tuthill v. Wilson	90 N. Y. 428.....	577
Twelfth Ward Bank v. Brooks	68 App. Div. 220.....	19
U.		
Uggla v. Brokaw	117 App. Div. 588.....	519, 520
Ulster County Bank v. McFarlan ...	5 Hill, 432; 3 Den. 553.....	181
Union Associated Press v. Heath ...	49 App. Div. 247.....	157, 170
United States v. Alcorn	145 Fed. Rep. 995.....	108
United States v. Rauscher	119 U. S. 407.....	905
United States Condensed Milk Co. v. Smith	116 App. Div. 15; affd., 191 N. Y. 586.....	771
Unterberg v. Elder	72 Misc. Rep. 368.....	648
V.		
Vail v. Foster	4 N. Y. 812.....	180
Vail v. L. I. R. R. Co.	106 N. Y. 288.....	742
Valk v. Erie R. R. Co.	180 App. Div. 446.....	905
Van Cleef v. Van Vechten	180 N. Y. 571.....	682
Van Lieuw v. Johnson.....	.....	489
Van Syck v. Aspinwall	17 N. Y. 190, 193.....	158
Village of Saratoga v. Van Norder ...	75 App. Div. 204.....	494
Vitelli v. May	120 App. Div. 448.....	726
Vogel v. Nachemson	137 App. Div. 200; affd., 199 N. Y. 585.....	889, 840
Vogel Co. v. Backer Const. Co.	148 App. Div. 639.....	112
Volkmar v. Manhattan R. Co.	184 N. Y. 418.....	821
Vooth v. McEachen	181 N. Y. 28.....	280
W.		
Wager v Link	134 N. Y. 122; 150 id. 549.....	180
Wahrman v. Board of Education	187 N. Y. 381.....	520
Wakeman v. Wheeler & Wilson Mfg. Co.	101 N. Y. 205.....	229, 281, 615
Wamsley v. Atlas Steamship Co.	168 N. Y. 538.....	336
Wanamaker v. Weaver	176 N. Y. 78-82.....	664
Ward v. Haight	8 Johns. Cas. 80.....	806
Ward v. Hudson River Building Co. ..	125 N. Y. 230.....	276
Ward v. Kilpatrick	85 N. Y. 413-418.....	726
Waring v. Indemnity Fire Ins. Co. ...	45 N. Y. 606.....	644
Warner v. N. Y. C. R. R. Co.	52 N. Y. 437.....	408
Warren v. Banning	140 N. Y. 227.....	840
Warsaw Water Works Co. v Village of Warsaw	161 N. Y. 176.....	491

TABLE OF CASES CITED.

lv

	PAGE.
<i>Washburn v. Benedict</i>	46 App. Div. 484..... 803
<i>Webster v. Fargo</i>	181 U. S. 894..... 894
<i>Weed v. First National Bank</i>	106 App. Div. 285..... 468
<i>Weeks v. Whitney</i>	146 App. Div. 621..... 112
<i>Weiss v. Mendelson</i>	24 Misc. Rep. 692..... 889
<i>Wessel v. Schwarzler, No. 1</i>	144 App. Div. 587..... 111
<i>Wetmore v. Parker</i>	52 N. Y. 450, 450..... 128, 129
<i>Wetmore v. Porter</i>	92 N. Y. 76..... 464
<i>Wexler v. Rust</i>	144 App. Div. 296..... 692
<i>Wheeler v. Reynolds</i>	66 N. Y. 227..... 463
<i>White v. Howard</i>	46 N. Y. 144..... 180
<i>White v. Hoyt</i>	73 N. Y. 505, 511..... 228
<i>Whitman v. Morey</i>	63 N. H. 448..... 873
<i>Wilcox v. American Telephone & Telegraph Co.</i>	176 N. Y. 115..... 557
<i>Willetts v. Watt & Co.</i>	L. R. (1892) 2 Q. B. Div. 92, 98. 898
<i>Williams v. Connors</i>	58 App. Div. 599..... 265
<i>Williams v. Williams</i>	8 N. Y. 525..... 128, 129
<i>Williamson v. Taylor</i>	48 Eng. C. L. (5 Q. B.) 175..... 264
<i>Willover v. Hill</i>	72 N. Y. 86..... 159
<i>Wills v. Jones</i>	18 App. Cas. (D. C.) 482..... 156
<i>Winne v. Winne</i>	95 App. Div. 48..... 742
<i>Wirt v. Reid</i>	188 App. Div. 760..... 408
<i>Wise v. Gessner</i>	47 Hun, 306..... 266
<i>Witherbee v. Meyer</i>	155 N. Y. 446..... 230
<i>Wittgren v. Wells Bros. Co.</i>	141 App. Div. 698..... 961
<i>Wolf v. American Tract Society</i>	164 N. Y. 80..... 426, 738
<i>Wolfe v. Mosler Safe Co.</i>	189 App. Div. 848..... 879
<i>Wood v. Hoffman Co.</i>	121 App. Div. 686..... 111
<i>Wood v. Niagara Falls Paper Co.</i>	121 Fed. Rep. 818..... 108
<i>Wood v. Rabe</i>	96 N. Y. 414..... 465
<i>Wood v. Simpson, No. 1</i>	149 App. Div. 471..... 474, 475
<i>Wright v. Cabot</i>	89 N. Y. 570, 571..... 595, 597
<i>Wyckoff v. Taylor</i>	18 App. Div. 240..... 85, 86
<i>Wylie v. Palmer</i>	187 N. Y. 248..... 878

Y.

<i>Yates v. Van De Bogert</i>	56 N. Y. 526..... 742
<i>Youmans v. Paine</i>	86 Hun, 479..... 169
<i>Young v. Fox</i>	26 App. Div. 261..... 168
<i>Young v. Mason Stable Co., Ltd.</i>	96 App. Div. 305, 310..... 868
<i>Yuille-Miller Co. v. Chicago, I. & L. R. Co.</i>	128 N. W. Rep. 1099

Z.

<i>Zeiser v. Cohn</i>	144 App. Div. 825..... 801
<i>Zimmer v. Third Avenue R. R. Co., No. 1</i>	36 App. Div. 265, 272..... 807, 808

UNITED STATES CONSTITUTION CITED.

PAGE.	PAGE.
U. S. Const. art. 1, § 10..... 422	U. S. Const. 14th Amendt., § 1.. 656
U. S. Const. art. 4, § 1..... 457	
U. S. Const. art. 6, subd. 2..... 905	891

UNITED STATES STATUTES AT LARGE CITED.

PAGE.	PAGE.
24 U. S. Stat. at Large, 886, § 20. 883	34 U. S. Stat. at Large, 898, Rea.
34 U. S. Stat. at Large, 593, 595,	No. 47..... 883
§ 7..... 883-886	

NEW YORK STATE CONSTITUTION CITED.

PAGE.	PAGE.
Const. (1777), § 29..... 820	Const. (1874), art. 8, §§ 22-24.... 820
Const. (1821), art. 4, § 7..... 820	Const. (1894), art. 1, §§ 1, 6..... 891
Const. (1846), art. 8, §§ 5, 17..... 820	Const. (1894), art. 8, §§ 26-28. 820, 821
Const. (1846), art. 10, § 2..... 820	Const. (1894), art. 10, § 2..... 494

NEW YORK REVISED STATUTES CITED.

PAGE.	PAGE.
1 R. S. 768, § 8..... 181	2 R. S. 68, § 40..... 87

GENERAL LAWS CITED.

PAGE.	PAGE.
Gen. Laws, chap. 18, § 36... 819-829	Gen. Laws, chap. 35, § 18... 826, 827
chap. 19, § 16... 810, 811	chap. 36, § 27..... 88
chap. 24, § 222.. 429, 490	chap. 36, § 48... 474, 688
chap. 24, § 230... 429-431	
chap. 25, § 20... 286-290	chap. 36, § 57... 626, 631
chap. 31, §§ 186-188.. 771	chap. 39..... 416
chap. 31, § 228... 765-772	chap. 39, § 4, subd. 2. 415
chap. 32, § 18.... 749-752	
	416
759, 760	chap. 39, § 6..... 418

CONSOLIDATED LAWS CITED.

lvii

PAGE.	PAGE.
Gen. Laws, chap. 39, § 7..... 415, 416	Gen. Laws, chap. 40, § 80 et seq.,
chap. 39, § 42a... 218, 920	as amd..... 419, 420
chap. 39, § 59..... 418	chap. 40, § 82..... 420
chap. 39, § 59a..... 414	chap. 42, § 11.... 326-328
chap. 39, § 64.... 895, 896	chap. 50, § 238.. 180, 181
chap. 39, § 90..... 418	186
chap. 40..... 420	

CONSOLIDATED LAWS CITED.

PAGE.	PAGE.
Consol. Laws, chap. 1, § 89..... 888	Consol. Laws, chap. 17, § 87..... 70
chap. 1, § 40..... 892	72-75, 77, 95, 96
chap. 1, § 41.. 888-892	chap. 17, § 88.... 72
chap. 2, art. 10. 847-849	77-79, 779
chap. 2, §§ 86-88.. 530	chap. 17, § 89.... 72
532	chap. 17, § 40.. 72, 950
chap. 2, §§ 89, 40.. 530	chap. 17, § 47.. 79, 950
581, 532	chap. 17, §§ 48, 49. 79
chap. 2, § 810..... 849	chap. 17, § 53.. 691-698
chap. 2, § 814. 844-849	chap. 17, § 55.... 778
chap. 4, §§ 7-11... 532	780
chap. 7..... 494	chap. 17, § 56.. 75, 79
chap. 11, § 87. 818-823	698
chap. 18, § 21..... 87	chap. 17, § 57.. 95, 97
chap. 16, art. 20.. 409	chap. 17, § 58.... 95-97
410	691, 692, 694
chap. 16, art. 28	chap. 17, § 64.. 76, 77
(20)..... 409, 410	chap. 17, § 75 (49). 79
chap. 16, § 198,	chap. 17, § 111
subd. 4..... 410	(66)..... 76
chap. 16, § 276,	chap. 17, § 112
subd. 4..... 410	(67)..... 779
chap. 16, § 567	chap. 19, § 72.... 765
(568)..... 409, 410	chap. 23, § 21.... 826
chap. 16, § 568.... 409	827
410	chap. 23, § 221,
chap. 17..... 690	subd. 8..... 681
chap. 17, arts. 2,	chap. 24, § 51.... 492
8..... 73	495
chap. 17, § 8 (2)... 779	chap. 25..... 885, 886
chap. 17, §§ 16-20	chap. 25, art. 4... 921
(36-40)..... 73	923
chap. 17, § 85	chap. 25, § 15,
(old)..... 73	subd. 5..... 885
chap. 17, § 85	chap. 25, § 80.... 884
(new)..... 73, 78	chap. 25, § 88.... 885
chap. 17, § 86.. 72, 78	chap. 25, §§ 40, 44. 921
76, 77	chap. 25, § 47.... 235

PAGE.	PAGE.
Consol. Laws, chap. 25, § 48..... 885	Consol. Laws, chap. 33, § 54. 726, 729
chap. 25, § 71. 284, 285	chap. 33, § 188.... 196
chap. 25, § 73..... 285	197
chap. 25, § 74. 284-286	chap. 34, § 15,
921, 922	subd. 8..... 639
chap. 25, § 75..... 285	chap. 34, § 27..... 639
chap. 30, § 5..... 795	chap. 34, § 28. 638, 639
chap. 31, art. 14.. 389	chap. 38, § 228.... 180
390, 392, 394, 753, 758	181, 186
760	chap. 41, § 12.... 120
chap. 31, § 18. 749, 750	124, 126
759, 760, 984	chap. 41, § 12,
chap. 31, § 81..... 754	subd. 4..... 120
755, 757	chap. 41, § 48..... 473
chap. 31, § 200.... 188	chap. 45, § 20. 287-290
189, 191, 192, 760, 761	chap. 49, § 98..... 895
chap. 31, § 202.... 442	chap. 49, §§ 140,
528, 529	141-155..... 532
chap. 33..... 720, 726	chap. 50..... 927
727, 729, 768	chap. 50, § 118... 120
chap. 33, § 5.. 724, 725	124
chap. 33, § 19. 305-307	chap. 51, § 12... 326-328
chap. 33, § 19,	chap. 59, § 30.... 28
subd. 4.... 305-307	chap. 59, § 66. 474, 688
725	689
chap. 33, § 21,	chap. 59, § 69.... 825
subd. 4..... 728	chap. 60, § 223.... 429
chap. 33, § 21,	430
subd. 5.... 726, 728	chap. 60, § 230. 429-431
chap. 33, § 43. 585, 588	chap. 61, § 2..... 40
chap. 33, § 44.... 585	chap. 61, § 16.... 83
chap. 33, § 44,	chap. 61, § 76-88, 40
subd. 8..... 585	41
chap. 33, § 45. 585, 586	chap. 68, § 82.... 420

SESSION LAWS CITED.

PAGE.	PAGE.
1830, chap. 179..... 473	1890, chap. 565, § 4, subd. 2.. 415, 416
1849, " 184..... 321	1890, " 565, § 6..... 413
1849, " 184, § 4, subd. 15.. 321	1890, " 565, § 7..... 415, 416
1867, " 697..... 59, 60	1890, " 565, § 42a..... 218, 920
1867, " 697, § 3..... 59, 60	1890, " 565, § 59..... 413
1869, " 142..... 310	1890, " 565, § 59a..... 414
1870, " 861..... 321	1890, " 565, § 64..... 895, 896
1880, " 536..... 498	1890, " 565, § 90..... 413
1886, " 572..... 517, 810, 811	1890, " 566, § 80 et seq., as
1890, " 565..... 416	amd..... 419, 420

PAGE.	PAGE.
1890, chap. 566, § 33.....	420
1890, " 568, § 16.....	810, 811
1892, " 617.....	420
1892, " 676.....	418, 415, 416
1892, " 686, § 36.....	819-822
1892, " 687, § 18.....	826, 827
1892, " 688, § 27.....	28
1892, " 688, § 48	474, 688, 689
1892, " 688, § 57.....	626, 681
1892, " 690, § 55.....	617
1893, " 587.....	676
1893, " 587, § 1 et seq.....	677
1893, " 661, § 20.....	286-290
1893, " 701 120-125, 129, 180	1901,
1894, " 186.....	826, 827
1894, " 147.....	652, 655-657, 659
1894, " 147, § 1.....	657
1894, " 147, § 8.....	652, 653, 655
	656, 658, 659
1894, " 147, § 4.....	652-656, 658
	659
1894, " 567.....	676
1894, " 567, § 1.....	677
1895, " 72.....	846-848
1895, " 475.....	625
1895, " 545.....	418
1895, " 601.....	795
1895, " 601, § 5.....	795
1895, " 728, § 11.....	826-828
1895, " 933.....	418
1895, " 1006.....	62, 66, 67
1895, " 1006, § 4.....	57, 58
1895, " 1006, § 6.....	58, 65-67
1896, " 906, § 222.....	429, 480
1896, " 906, § 280.....	429-481
1896, " 932.....	626, 681
1897, " 878, § 284.....	717, 718
1897, " 878, §§ 1892, 1898.....	785
1897, " 415, § 18.. 749-752, 759, 760	1904,
1897, " 612, § 228.... 180, 181, 186	1905,
1897, " 664.....	655, 656, 658, 659
1897, " 665.....	62
1897, " 665, § 3.....	62
1897, " 754.....	895, 896
1898, " 648.....	414
1899, " 517.....	893, 895, 896
1899, " 517, § 12.....	896
1900, " 20, §§ 186-188.....	771
1900, " 20, § 228.....	765-772
1900, " 760.....	626, 681
1901, " 291.. 120-122, 125, 129, 180	1901,
1901, chap. 384, § 2.....	40
1901, " 384, § 82.....	88-41
1901, " 384.....	474, 688, 689
1901, " 486.....	105, 107
1901, " 486, § 261.....	517
1901, " 486, § 284.....	717, 718
1901, " 486, § 406.....	829
1901, " 486, § 420.... 100, 102-107	1901,
1901, " 486, § 442.....	63
1901, " 486, § 1001.....	618, 621
1901, " 486, § 1007.....	620, 621
1901, " 486, § 1055.....	518, 519
1901, " 486, §§ 1064, 1066-1068.	519
1901, " 486, §§ 1071, 1078....	519
1902, " 140.....	895, 896
1902, " 208.....	826-828
1902, " 226.....	414
1902, " 437.....	617
1902, " 580, § 31.....	215, 216
1902, " 600.....	889, 890, 892, 894
	758, 760, 920
1902, " 600, § 1.....	760, 761
1903, " 48.....	519
1903, " 388.....	286-290
1903, " 409.....	63
1903, " 410.....	796
1903, " 612.....	717, 718
1904, " 484	287-290
1904, " 590.....	772
1904, " 590, § 5.....	765-772
1904, " 592.....	771
1904, " 650, as amd.....	886, 887
1904, " 650, § 60.....	886, 887
1904, " 661.....	847, 848
1905, " 210.....	420
1905, " 285.....	771
1905, " 368.....	429-481
1905, " 727.....	415, 416
1905, " 747.....	676
1906, " 253.....	287-290
1906, " 455.....	420
1906, " 657.....	218, 920
1906, " 658.....	620, 621
1907, " 96.....	771
1907, " 225	287-290
1907, " 278.....	717, 718

PAGE.	PAGE.
1907, chap. 429.....	414
1907, " 429, § 53.....	414
1907, " 677.....	517
1908, " 166.....	278
1908, " 363.....	326-328
1908, " 494.....	936
1909, " 9, § 39.....	888
1909, " 9, § 40.....	892
1909, " 9, § 41.....	888-892
1909, " 10, art. 10.....	847-849
1909, " 10, §§ 86-88.....	580, 582
1909, " 10, §§ 89, 40.....	590-592
1909, " 10, § 810.....	849
1909, " 10, § 814.....	844-849
1909, " 12, §§ 7-11.....	532
1909, " 15.....	494
1909, " 16, § 87.....	819-822
1909, " 18, § 21.....	87
1909, " 21, art. 20.....	409, 410
1909, " 21, § 198, subd. 4.....	410
1909, " 21, § 568.....	409, 410
1909, " 22.....	690
1909, " 22, arts. 2, 3.....	72
1909, " 22, § 3 (2).....	779
1909, " 22, §§ 16-20 (36-40)....	72
1909, " 22, § 35 (old).....	72
1909, " 22, § 35 (new).....	72, 73
1909, " 22, § 36.....	72, 73, 76, 77
1909, " 22, § 37.....	70, 72-75, 77
	95, 96
1909, " 22, § 38.....	72, 77-79, 779
1909, " 22, § 39.....	72
1909, " 22, § 40.....	72, 950
1909, " 22, § 47.....	79, 950
1909, " 22, §§ 48, 49.....	79
1909, " 22, § 53.....	691-698
1909, " 22, § 55.....	778, 780
1909, " 22, § 56.....	75, 79, 698
1909, " 22, § 57.....	95, 97
1909, " 22, § 58... 95-97, 691, 692	692
	694
1909, " 22, § 64.....	76, 77
1909, " 22, § 75 (49).....	79
1909, " 22, § 111 (66)	76
1909, " 22, § 112 (67).....	779
1909, " 24, § 72.....	765
1909, " 28, § 21.....	826, 827
1909, " 28, § 221, subd. 3.....	881
1909, " 29, § 51.....	492, 495
1909, " 30.....	885, 886
1909, " 30, art. 4.....	921, 922
1909, chap. 30, § 15, subd. 5.....	885
1909, " 30, § 30.....	884
1909, " 30, § 33.....	885
1909, " 30, §§ 40, 44.....	921
1909, " 30, § 47.....	235
1909, " 30, § 48.....	885
1909, " 30, § 71.....	284, 285
1909, " 30, § 73.....	235
1909, " 30, § 74.....	284-286, 921
	922
1909, " 30, § 75.....	285
1909, " 35, § 5.....	795
1909, " 36, art. 14.....	889, 890, 892
	894, 753, 758, 760
1909, " 36, § 18.....	749, 750, 759, 760
	984
1909, " 36, § 81.....	754, 755, 757
1909, " 36, § 200.. 188, 189, 191, 192	760, 761
	760, 761
1909, " 36, § 202.....	442, 528, 529
1909, " 38.. 720, 726, 727, 729, 768	768
1909, " 38, § 5.....	724, 725
1909, " 38, § 19.....	805-807
1909, " 38, § 19, subd. 4..	805-807
	725
1909, " 38, § 21, subd. 4.....	728
1909, " 38, § 21, subd. 5..	736, 728
1909, " 38, § 43.....	585, 858
1909, " 38, § 44.....	585
1909, " 38, § 44, subd. 3.....	585
1909, " 38, § 45.....	535, 536
1909, " 38, § 54.....	728, 729
1909, " 38, § 183.....	196, 197
1909, " 39, § 15, subd. 8.....	689
1909, " 39, § 27.....	689
1909, " 39, § 28.....	688, 689
1909, " 48, § 228.....	180, 181, 186
1909, " 45, § 12.....	120, 124, 126
1909, " 45, § 12, subd. 4.....	120
1909, " 45, § 43.....	473
1909, " 49, § 20.....	287-290
	927
1909, " 52.....	120, 124
1909, " 52, § 118.....	120, 124
1909, " 58, § 12.....	826-828
1909, " 61, § 30.....	28
1909, " 61, § 66.....	474, 688, 689
1909, " 61, § 69.....	825
1909, " 62, § 222.....	429, 480
1909, " 62, § 230.....	429-481
1909, " 99, § 2.....	40
1909, " 99, § 16.....	88

SECTIONS OF CODE OF CIV. PROC. CITED. lxi

PAGE.	PAGE.
1909, chap 99, § 76..... 88, 40, 41	1910, chap. 485..... 689
1909, " 144 120, 126	1910, " 508 689
1909, " 153 895, 896	1910, " 559 822
1909, " 165 288	1910, " 567 884
1909, " 219, § 82 420	1910, " 659, § 71 796
1909, " 281 688, 689	1911, " 220 120
1909, " 354 88	1911, " 388 38, 41
1909, " 357 888-892	1911, " 450 724, 726
1909, " 409 409, 410	1911, " 643 689
1910, " 106 754, 755, 757	1911, " 698 749, 760
1910, " 127 847-849	1911, " 763 8, 4, 58, 444
1910, " 140, art. 28 409, 410	1911, " 873 724, 726
1910, " 140, § 276, subd. 4.... 410	1911, " 891... 70, 72-79, 95-97, 691
1910, " 140, § 587 409, 410	692-694, 778-783, 950
1910, " 852.. 441, 442, 758, 758, 760	1911, " 891, § 58 76
	761 1911, " 891, § 65 76, 77
1910, " 476 765	1912, " 4.... 96, 691-698, 778, 780
1910, " 481, § 98 895	
1910, " 481, §§ 140-155..... 582	783, 783

SECTION OF THE CODE OF PROCEDURE CITED.

PAGE.
Code Proc. § 247..... 278

SECTIONS OF THE CODE OF CIVIL PROCEDURE
CITED.

PAGE.	PAGE.
Code C. P. § 6..... 795, 796	Code C. P. § 808..... 493
§ 194..... 806	§ 820..... 608, 609
§ 481..... 494	§ 822..... 861, 862
§ 459..... 174	§ 829..... 261
§ 488..... 49	§ 884..... 807, 808
§ 516..... 901	§ 886..... 807
§ 519..... 264	§§ 870, 872..... 492
§ 531..... 477, 585-587	§ 872, subd. 4..... 268
§ 523..... 586, 901	§ 872, subd. 7... 498, 494
§ 587..... 278	§ 944..... 884
§ 544..... 245	§ 967..... 679
§ 547... 242, 273, 274, 470	§ 973..... 21, 28
	§ 998..... 829
§§ 655, 708, subd. 4... 584	§ 999..... 806
§ 728..... 858	§ 1019..... 251, 252
§ 760..... 245	§ 1187..... 408
§ 768..... 8, 4, 58, 444	§ 1279..... 177, 850, 897

RULES CITED.

PAGE.	PAGE.
Code C. P. § 1629..... 868	Code C. P. § 2989..... 871
§ 1766..... 484, 485	§§ 3191, 3198..... 908
§ 1919..... 164	§ 3258..... 105, 451
§§ 2184, 2185, 2187, 2188. 672	§§ 3272, 3273..... 746
§ 2231..... 567	§ 3348, subd. 12..... 548
§ 2606..... 588	§ 3348, subd. 18..... 494
§ 2653a 486, 552	§ 3880..... 411
§§ 2692, 2698..... 588	§ 3401..... 868
§ 2807..... 18	§ 3412..... 728, 739
§ 2818..... 588	

SECTIONS OF THE CODE OF CRIMINAL PROCEDURE
CITED.

PAGE.	PAGE.
Code Cr. P. § 844..... 138	Code Cr. P. § 527..... 878
§ 876, subd. 2. 135, 136	§ 542..... 170
§ 898..... 878	

SECTIONS OF THE PENAL CODE CITED.

PAGE.	PAGE.
Penal Code, § 73..... 545	Penal Code, § 878 846-848
§ 246. 154	

SECTIONS OF THE PENAL LAW CITED.

PAGE.	PAGE.
Penal Law, § 2..... 298	Penal Law, § 813..... 295, 296, 298
§ 27..... 849	§ 1844. 154
§ 873..... 545	§ 2400..... 847, 848

RULES CITED.

PAGE.	PAGE.
General Rules of Practice, rule 87..... 252	General Rules of Practice, rule 82, 268, 269
General Rules of Practice, rule 89..... 929, 937	App. Div. Rules, 2d Dept., Special Rule..... 929

STATUTES OF THE STATES AND TERRITORIES
CITED.

Michigan.	PAGE.	Michigan.	PAGE.
Const. 1850, art. 15, § 11... 164, 165	165	Public Acts of 1905, No. 188... 165	165
Const. 1909, art. 12, § 2..... 165		Pennsylvania.	
Compiled Laws of 1897, chap. 160, § 10..... 165		Laws of 1907, chap. 329..... 924	

FOREIGN STATUTES CITED.

England.	PAGE.	Germany.	PAGE.
24 & 25 Vict., chap. 100, § 4.... 296	296	Commercial Code, §§ 518, 514.. 904	904
France.		Sea Accident Insurance Law of 1900..... 903, 904	
Concordat of 1801..... 117	117	Treaty with United States.... 905	905
Separation Law of 1905... 115-119	115-119		
	127, 128		

Cases
DETERMINED IN THE
APPELLATE DIVISION
OF THE
SUPREME COURT
OF THE
State of New York.

BARRETT MANUFACTURING COMPANY, Appellant, Respondent,
v. JESSIE V. SERGEANT, Respondent, Appellant, Impleaded
with **ELEANOR M. SERGEANT**, Defendant.

First Department, February 2, 1912.

Practice — pleading — motion for several kinds of relief — false representations — making complaint more definite and certain — bill of particulars.

It is proper practice under section 768 of the Code of Civil Procedure, as amended, to move at the same time for several kinds of relief in the alternative or otherwise.

Where upon a motion to make a complaint more definite and certain, to require plaintiff to separately state and number the causes of action and for a bill of particulars, it appears that the complaint alleged that plaintiff bought of defendants over 30,000,000 pounds of paper stock; that defendants represented that the same was of a certain quality and that said representations were false to defendants' knowledge and were made with intent to and did deceive plaintiff to its damage in a certain sum and the moving affidavits show that the defendants were merely middlemen; that the first transaction between the parties occurred over eight years before the suit and that their mutual dealings extending over a number of years involved a large number of separate shipments, the plaintiff will be compelled to make the complaint more definite and certain so as to show whether it intends to allege that there was but one transaction or several, and whether it is suing on one contract or several different ones.

First Department, February, 1912.

[Vol. 149.]

Also, if it appear that several separate contracts of sale are being sued upon, they must be separately stated and numbered; if, on the other hand, it appear that but one contract is being sued upon, then the transaction is of such a peculiar and unusual character that plaintiff should furnish a bill of particulars thereof.

It seems, that a large number of causes of action have been united in one allegation and that there could not have been but one sale preceded or accompanied by fraudulent misrepresentations in regard to such a large quantity of paper stock.

CROSS-APPEALS by the plaintiff, Barrett Manufacturing Company, and the defendant Jessie V. Sergeant, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of November, 1911, granting the defendants a bill of particulars and extending their time to answer, and denying the defendants' motion to require plaintiff to make the complaint more definite and certain and to separately state and number the causes of action.

W. W. Niles of counsel [*Niles & Johnson, attorneys*], for the plaintiff.

John Ewen of counsel [*Wilder, Ewen & Patterson, attorneys*], for the defendants:

CLARKE, J.:

The complaint alleges that plaintiff is a foreign corporation and defendants are copartners; that between April 12, 1904, and April 16, 1908, plaintiff bought from defendants, and defendants by their agents delivered to plaintiff, certain material, to wit, stock for the manufacture of paper, which deliveries were made in carload lots; on information and belief, that the defendants represented to plaintiff that the defendants had delivered materials as aforesaid to the plaintiff to the amount of 30,717,848 pounds and that the materials so delivered were of the quality by which they were designated when billed to plaintiff; that the said representations were false and were known by defendants to be false when made, and were made with intent to deceive and defraud the plaintiff; that plaintiff believed and relied upon said false and fraudulent representations and was thereby induced to and did pay to the defendants the sum of \$222,242.41 for the said materials so

App. Div.] First Department, February, 1912.

represented to have been delivered; that the value of the materials which were actually delivered was not more than \$120,000 and that the value of the materials which were actually delivered was \$102,242.41 less than it would have been if defendants' said representations as to the amount and quality of materials delivered had been true, and asked judgment for that amount.

The defendants before answer and under section 768 of the Code of Civil Procedure, as amended by chapter 763 of the Laws of 1911, providing that "The party making a motion may, in the notice thereof, specify one or more kinds of relief in the alternative or otherwise," made a motion, (1) that the plaintiff be required to make its complaint more definite and certain by separately setting forth and specifying as to whether it is claimed that but one sale was covered and but one representation made during the period between April 12, 1904, and April 16, 1908, or if more than one sale and delivery was made during that period, the date of each representation and of each sale and delivery, the quantity and materials covered by each delivery; the character of the materials, the shortage in weight claimed upon each such delivery; the character of the differences in quality where claimed, and the damage claimed on each delivery on account of inferior quality; (2) to separately state each cause of action covered by the complaint; (3) to furnish a bill of particulars showing the particulars of the claim in the enumerated respects.

The court denied the first two branches of the relief sought, holding that the complaint may properly be taken to allege one cause of action with sufficient definiteness, and granted the motion for a bill of particulars. Both sides appeal. The propriety and usefulness of the new Code provision permitting motions for several kinds of relief are demonstrated by these papers.

It is quite evident upon the face of the complaint and from the affidavits of the moving party, which sets up that defendants were mere middlemen, that, the first transaction having occurred over eight years ago and the mutual dealings having extended over a number of years and involved a large number of separate shipments, the defendant is entitled to some one of the reliefs asked for. I think it is apparent that a large

number of causes of action have been united in one allegation, there could not have been one sale or one set of fraudulent misrepresentations.

The defendants claim that they are entitled to set up against many of these causes of action the Statute of Limitations and against others the defense of accord and satisfaction: that this they are quite unable to do unless the complaint is put in proper shape.

If I am right and a series of separate transactions are embraced within the allegations of this complaint, then undoubtedly each such transaction constitutes a separate cause of action and the motion of the defendant to compel the plaintiff to separately state and number such causes of action should have been granted. If, on the other hand, the plaintiff intends to claim that there was but one transaction and that the delivery of this enormous quantity of material of upwards of thirty millions of pounds, which extended over a period of upwards of four years, was the result of one sale, preceded or accompanied by false and fraudulent representations, why then the motion to make the complaint more definite and certain so as to clearly allege said claim should have been granted.

A bill of particulars is rarely granted before answer, and only under special and unusual circumstances. The complaint should certainly be made more definite and certain. If it should then appear that separate contracts of purchase and sale are sued upon, they must be separately stated and numbered and will contain the particulars required by the motion made for that purpose, and there will be no need for a bill of particulars in addition thereto before answer. If, however, the complaint when made more definite and certain should clearly show that but one contract is sued upon, then we are of opinion that the transaction is of that peculiar and unusual character which warrants the granting of an order for a bill of particulars. As both parties have appealed, this court is enabled to apply the new remedy provided in the amended section of the Code referred to *supra*.

The order appealed from should be modified to provide that the plaintiff make its complaint more definite and certain in the respects referred to, and if there be more than one contract

App. Div.] First Department, February, 1912.

sued on, to separately state and number its several causes of action, and as so modified affirmed, with ten dollars costs and disbursements to the defendant.

INGRAHAM, P. J., MC LAUGHLIN, LAUGHLIN and SCOTT, JJ. concurred.

Order modified as directed in opinion, and as modified affirmed, with ten dollars costs and disbursements to defendant. Order to be settled on notice.

MILTON BERLINGER and SIMON P. HAMELBURGER, Respondents,
v. DWIGHT MACDONALD, Appellant.

First Department, February 2, 1912.

Landlord and tenant — rent of apartment — heating plant under control of landlord — implied covenant to furnish heat — constructive eviction — action for rent — question for jury.

Where the owners of an apartment house containing thirty separate apartments all heated by a common heating plant in the basement, which was under the exclusive control of the landlords, lease one of the apartments to be used exclusively as a dwelling, and it appears that there was no way of heating the same except by the steam radiators which formed part of the system under the landlords' control, a covenant by the latter to supply the heat necessary to keep the apartment warm and habitable will be read into the lease.

Even though there is no covenant to that effect, the landlords are obligated to supply sufficient heat to keep the apartment warm.

The landlords, having made it impossible for heat to be furnished except by the means under their control, were bound to furnish it and for their failure to do so the tenant may vacate and thereafter successfully resist the collection of the rent reserved.

The tenant would not be justified in vacating the premises because upon some particular occasion they were not kept warm, but if the landlords' failure to supply sufficient heat is continued for an unreasonable time, he may do so.

A constructive eviction is an obstruction of the beneficial enjoyment of the premises and a diminution of the consideration of the contract by the act of the landlord.

The acts of the landlord need not be with intent to compel the tenant to leave or to deprive him of the beneficial enjoyment of the property; all that is necessary is that the acts are calculated to and do make it necessary for the tenant to move.

First Department, February, 1912.

[Vol. 149.]

Where it appears that during the greater part of December and for a week in January the temperature in the rented apartment was below sixty degrees Fahrenheit most of the day and that little or no heat was supplied from eleven P. M. till seven A. M., the tenant is justified in vacating the apartment.

Such insufficiently heated premises were not what had been leased and the consideration for the rent failed.

In an action to recover rent for such apartment it is reversible error for the court to hold as a matter of law that plaintiffs were entitled to recover and to direct a verdict in their favor, for, if defendant's witnesses were to be believed, he was justified in vacating the apartment.

APPEAL by the defendant, Dwight Macdonald, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 3d day of December, 1910, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 3d day of January, 1911, denying the defendant's motion for a new trial made upon the minutes.

Arthur C. Bostwick, for the appellant.

Walter Loewenthal, for the respondents.

McLAUGHLIN, J.:

The plaintiffs are the owners of an apartment house and bring this action to recover rent from January 1 to July 1, 1910, alleged to be due for an apartment therein. The answer sets up a defense of constructive eviction due to plaintiffs' failure to furnish sufficient heat to render the apartment habitable. The lease was in writing and was for a term of one year from October 1, 1909. The rent stipulated to be paid was \$100 per month, payable in advance on the first day of each month. There was no provision in the lease with reference to heating the apartment or maintaining any stated temperature therin. There was a provision in it, however, that the apartment leased was to be occupied as a strictly private dwelling by the defendant and his family and not otherwise. On the 7th of January, 1910, the defendant, after having made numerous complaints to plaintiffs' agent in charge, with regard to the heat supplied, vacated the apartment and surrendered possession of it to the plaintiffs on the

App. Div.] First Department, February, 1912.

ground that the same was not habitable. The trial court, at the conclusion of the evidence, directed a verdict in favor of the plaintiffs for the amount of the rent sought to be recovered, and from the judgment entered thereon and an order denying a motion for a new trial, defendant appeals.

The building is six stories in height and contains thirty separate apartments, the one leased by the defendant being located on the sixth floor. There was no way of heating the apartment except that supplied by the landlords, which consisted of radiators placed in the different rooms, which were connected, in common with all others in the building, by pipes with a steam boiler in the basement. The entire heating plant was under the exclusive control of the landlords, except that the tenants could let the steam into or cut it off from the radiators. There was in one of the rooms in the apartment leased by the defendant a gas log, but this could not and was not intended to heat the whole apartment. Under these conditions, notwithstanding the fact that there was no covenant in the lease that the landlords should supply the necessary heat to keep the apartment warm and make the same habitable, they were, nevertheless, obligated to do so. Such a covenant is to be read into the lease. By express provision in the lease the defendant was bound to use the apartment leased only for a private dwelling for himself and family. He could not so occupy it unless artificial heat were furnished in cold weather. If the apartment were not kept warm, or if sufficient heat were not furnished to make it habitable, then the premises were not what had been leased and the consideration agreed to be paid failed. Artificial heat was just as necessary during the winter months, or some portion of them, as access to and from the apartment. The landlords having made it impossible for heat to be furnished, other than by means under their control, were bound to furnish it, or for their failure a tenant might vacate and thereafter resist the collection of the rent stipulated to be paid. Of course a tenant would not be justified in vacating premises because upon some particular occasion he was deprived of their beneficial enjoyment by an act of omission or commission on the part of the landlord. He would, however, if such act continued or were persisted in for an unreasonable time.

First Department, February, 1912.

[Vol. 149.]

In that case there would be a constructive eviction, which has been defined to be an obstruction to the beneficial enjoyment of the premises and a diminution of the consideration of the contract by the act of the landlord. The act or omission of the landlord need not be with intent to compel the tenant to leave the property or to deprive him of its beneficial enjoyment; all that is necessary is that the acts are calculated to and make it necessary for the tenant to move.

In speaking of the acts of a landlord which would amount to a constructive eviction, the Court of Appeals in *Tallman v. Murphy* (120 N. Y. 345) said: "In such a building as the one under consideration there is very much that remains under the charge and control of the landlord. The heating of the apartments, the supply of water, all sanitary arrangements and many other things essential to the proper enjoyment of the apartments in the building by the tenants thereof, are regulated and controlled by the landlord, and he owes a duty to the tenant to see that all such matters and appliances are kept in proper order, and if he persistently neglects them and by reason of such neglect the tenant is deprived of heat or water, or his apartments are filled with gas or foul odors from the same, and the apartments become unfit for occupancy, the tenant is deprived of the beneficial enjoyment thereof, and the consideration for which he agrees to pay rent fails and there is a constructive eviction." (See, also, *Jackson v. Paterno*, 128 App. Div. 474.)

The defendant and his wife testified, in substance, that in the forenoon of nearly every day during the greater part of December, 1909, and up to January 7, 1910, when they moved out, the apartment was so cold that they and their children could not keep warm without wearing wraps and overcoats over their ordinary clothing; that for three days in succession during this time, between nine A. M. and four-thirty P. M., the temperature ranged from fifty-six degrees to fifty-nine degrees F.; that on one day during the same hours the temperature did not go above forty-five degrees; that on twelve mornings during December and January the temperature at nine A. M. was only fifty-seven degrees or less, and on one morning was as low as forty-two degrees; that little or no heat

App. Div.] First Department, February, 1912.

was supplied after eleven o'clock at night until between seven and eight o'clock the next morning. Their family physician testified he was in the apartment several times during those months at about eleven o'clock A. M., and on each occasion the apartment was extremely cold, the temperature ranging between fifty degrees and sixty degrees, according to a thermometer he saw in one of the rooms. During this time the defendant made numerous complaints to the agent in charge of the building, about the heat, and requested that heat be furnished, and stated he could not continue in the apartment unless more heat were furnished.

If the apartment were as cold as testified to by the defendant's witnesses, and the same were due to the act of the landlords, then defendant was justified in vacating, because he was not receiving what the landlords had agreed to give him — an apartment suitable to be occupied as a private dwelling. He could not heat the apartment, because the heating plant was under the exclusive control of the landlords.

There was considerable testimony offered by the plaintiffs to the effect that the heating plant installed in the basement was sufficient to keep the apartment warm, but such testimony did not contradict the testimony of defendant's witnesses to the effect that little or no heat was furnished between eleven o'clock at night and seven o'clock the next morning. They also offered testimony to the effect that the windows and doors in the apartment were left open; that clothes were put upon the radiators to dry, and that the temperature was due to such causes and not to the fact that sufficient heat was not furnished.

Whether the temperatures were during the time referred to as testified to by the defendant and his witnesses, and if so, whether the same were due to the act of the plaintiffs, was, at the conclusion of the trial, a question for the jury. The court could not hold, as matter of law, that the plaintiffs were entitled to recover, because, if the defendant's witnesses were to be believed, then the defendant was justified in vacating the premises and refusing to pay the rent sought to be recovered.

The case of *Martens v. Sloane* (132 App. Div. 114) is clearly distinguishable. There, as pointed out in the opinion, it did

First Department, February, 1912.

[Vol. 149.]

not appear that the apartment was so arranged that the landlord had control over its heating.

The judgment and order appealed from, therefore, are reversed and a new trial ordered, with costs to the appellant to abide event.

INGRAHAM, P. J., LAUGHLIN, MILLER and DOWLING, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

JAMES R. DEERING, as Receiver of the Property of CURTIS A. BARNUM, Respondent, *v.* CARLTON B. PIERCE, Appellant.

First Department, February 2, 1912.

Trust — death of life beneficiary — receiver in supplementary proceedings against remainderman — action against trustee for conversion.

An action at law cannot be maintained against a testamentary trustee upon the death of the life beneficiary by the receiver in proceedings supplementary to execution on judgments against the remainderman, to recover the amount of the trust fund originally received by the trustee. The death of the life beneficiary does not in and of itself sever the trustee's relation to the trust fund, but he continues as trustee until the amount of the fund and the person to whom it is payable have been judicially determined.

Such judicial determination can be had only after an accounting either in the Surrogate's Court or in a court of equity in a proceeding to which all persons interested in the fund are made parties.

Where the receiver of the remainderman appointed in supplementary proceedings brings an action in conversion against the trustee after demand to recover the whole amount of the fund, setting up the facts in regard thereto, and the defendant answers that he has made no accounting, and that he has not received his expenses or commissions, and that he is liable for the fund only in a proper proceeding to which the remainderman himself is a party, an order granting a motion by plaintiff for judgment on the pleadings will be reversed.

APPEAL by the defendant, Carlton B. Pierce, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New

App. Div.] First Department, February, 1912.

York on the 3d day of October, 1911, granting the plaintiff's motion for judgment on the pleadings.

Carlton B. Pierce, for the appellant.

Frank S. Williams, for the respondent.

McLAUGHLIN, J.:

In 1883 one Abijah Barnum died, leaving a will in which the defendant was named as trustee. The will was admitted to probate and letters testamentary issued to the defendant. By the will the testator gave to his widow the use of certain real estate, including furniture and personal property in a dwelling thereon during her life, and at her death gave the same to his son Curtis. The trustee named in the will was authorized and empowered, if the widow so desired, to sell the real estate, invest the proceeds and apply the income derived therefrom to her benefit during her life and upon her death to assign and transfer the same to the son. Some time after the death of the testator the widow desired the real estate sold, and the trustee, complying with her request, sold the same and received therefor \$4,000, and paid the income derived from such fund to her up to the time of her death, which occurred on the 16th of April, 1911. Shortly after the death of the widow the plaintiff, a receiver appointed in proceedings supplementary to execution, demanded that the defendant pay to him the "said fund of \$4,000." The demand not having been complied with, two days later this action was brought.

The complaint alleges that between 1885 and 1887 certain judgments were recovered against the son Curtis, upon which proceedings supplementary to execution were instituted, and the appointment of the plaintiff as the successor of a receiver duly appointed therein; that the plaintiff duly qualified, has since been and now is acting as such receiver; it also sets forth a portion of the will of Abijah Barnum; the appointment of the defendant as trustee thereunder; sale of the real estate; the proceeds derived therefrom; payment of the income to the widow; her death; that the defendant now has in his possession the fund of \$4,000, which he has refused to pay to the plaintiff after a demand, and that the defendant has wrong-

First Department, February, 1912.

[Vol. 149.]

fully converted said sum of \$4,000 to his own use, for which judgment is demanded.

The answer attempted to deny certain allegations of the complaint, and as a separate and distinct offense alleged that the defendant was appointed a testamentary trustee by the will referred to; that he accepted the trust; that he received the \$4,000 trust fund referred to in the complaint and still holds the same, but no accounting has been had by him; that his expenses and commissions have not been paid or any balance ascertained of the sum due the remainderman; and that he is liable for said fund only in a proper accounting as trustee, to which the son Curtis is a party. The answer also set up several other separate defenses, including one to the effect that all of the judgments referred to in the complaint were recovered more than twenty years prior to the commencement of this action; that no payments had been made upon them and the indebtedness represented by them had not been acknowledged by the judgment debtor or any one else.

After issue had been joined, the plaintiff moved for judgment on the pleadings. The motion was granted and the appeal is from the order.

A slight consideration of the facts set out in the complaint and answer, concerning which no issue is raised, would seem to indicate, without the citation of any authorities, that the plaintiff is not entitled to judgment on the pleadings. The defendant is a testamentary trustee and the \$4,000 which the plaintiff is seeking to reach came into his hands and he now holds the same, or the investments represented by it, as such. He has not accounted. His expenses and commissions have not been ascertained or paid, nor has it been ascertained what fund or investments he now holds other than the originally received \$4,000.

It is at least a novel proposition that a testamentary trustee immediately upon the death of the life beneficiary becomes personally liable for the amount of the trust fund originally received in an action for conversion. If such an action could be maintained it is not difficult to imagine that a competent and responsible person would hesitate to act as testamentary trustee. But such an action cannot be maintained and for the

App. Div.] First Department, February, 1912.

obvious reason that the death of the life beneficiary does not, in and of itself, sever the trustee's relation to the fund. He still continues as trustee thereof until the amount of the fund he holds and to whom he shall pay it has been judicially determined. Such determination can only be had after an accounting either in the Surrogate's Court or in a court of equity, in a proceeding instituted or an action brought for that purpose, to which all persons interested are made parties.

Husted v. Thomson (7 App. Div. 66; affd., 158 N. Y. 328) is decisive of the question. It was there held that an action at law, by a beneficiary of a trust created by a will, could not be maintained until the trust had been closed and the balance ascertained.

Under the conceded facts, the remainderman here could not maintain an action, and the plaintiff is certainly in no better position than the remainderman would be. Before the plaintiff can compel the payment to him of the fund, or any part of it, the trustee must have accounted. The right to compel an accounting in the Surrogate's Court is given by section 2807 of the Code of Civil Procedure. An action may also be maintained in the Supreme Court for an accounting, because from its equitable powers it has control over testamentary trustees in the discharge of their duties, whether affecting real or personal estate.

In reaching the foregoing conclusion I have not deemed it necessary to consider or pass upon the other defenses pleaded. This can be done upon the accounting.

The order appealed from is, therefore, reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

INGRAHAM, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

ABRAHAM FELT, Respondent, *v.* THE GERMANIA LIFE INSURANCE COMPANY, Appellant.

First Department, February 2, 1912.

Libel and slander — real estate — slander of title — complaint — damage — insufficient allegations.

A defendant by moving for judgment on the pleadings admits the truth of the facts alleged in the complaint.

A complaint in an action for slander of title to real estate in order to constitute a cause of action must allege not only that the statement complained of was false and published maliciously, but must set forth facts showing that pecuniary damage resulted to the plaintiff by reason thereof.

Where the complaint alleges that by reason of defendant's false statements in regard to his title to certain lands plaintiff was unable to consummate the sale thereof to a realty company which was able and willing to purchase, but in connection therewith it is alleged that prior to the alleged false statements the realty company had entered into a written contract to buy and the plaintiff to sell the real estate referred to, and that such contract was in force when the alleged false statements were made, no pecuniary damage to plaintiff by reason thereof is shown, since plaintiff could have compelled the realty company to specifically perform the contract notwithstanding defendant's false statements.

Also, an allegation in the complaint that plaintiff was prevented by defendant's statements from selling the property not only to the realty company, but to certain individuals who were able and willing to buy it is insufficient to show pecuniary damage where the complaint shows that the offers to purchase by the individuals were made after plaintiff had entered into the contract with the realty company and while it was in force, for even had plaintiff desired to sell to them, he could not have done so because of his contract with the realty company.

APPEAL by the defendant, The Germania Life Insurance Company, from an order of the Supreme Court, made at the New York Special Term, bearing date the 8th day of November, 1911, and entered in the office of the clerk of the county of New York, resettling an order entered on the 27th day of October, 1911, denying the defendant's motion for judgment on the pleadings.

App. Div.] First Department, February, 1912.

J. Brewster Roe, for the appellant.

Joseph H. San, for the respondent.

McLAUGHLIN, J.:

Action to recover damages for an alleged slander of title to real estate. The complaint alleges, in substance, that on February 19, 1907, the plaintiff and one Malakoff, who were then the owners of certain real estate in the city of New York, borrowed from the defendant \$145,000, and as collateral security for the payment of a bond for that amount they executed and delivered to it a mortgage upon the real estate in question. The mortgage did not state when the money borrowed was payable. The only provision with reference thereto was that the amount loaned would become due at the time stated in the bond, the payment of which the mortgage was given to secure, and that the whole amount would become payable at the option of the defendant upon a default by the mortgagors in payment of interest or taxes. A default did occur in the payment of taxes in October, 1907, and the defendant thereupon gave notice that it elected to consider the whole amount due and payable. A few days later, however, upon payment of the taxes by the plaintiff, the defendant, in writing, withdrew the notice and reinstated the mortgage to its former condition. Sometime thereafter the plaintiff, to whom Malakoff had previously conveyed his interest in the land, made a contract in writing with the Nova Realty Company for the sale of the property subject to the mortgage held by the defendant. In the contract it was expressly stipulated that the mortgage would mature on February 1, 1912, which was the date named in the bond. Shortly after making the contract the plaintiff and the Nova Realty Company applied to the defendant for a written statement as to the time when the mortgage debt would become payable, and it gave a certificate to the effect that the mortgage was then due and had been due since October 18, 1907, the day when the notice was served that it elected by reason of the plaintiff's failure to pay the taxes to declare the whole sum due. It is alleged that this statement was false and that the defendant

maliciously and with intent to injure the plaintiff published the same, not only to the Nova Realty Company but to others, and by reason thereof the plaintiff was unable to consummate the sale to the Nova Realty Company or to one Walter E. Preble, or to others, each of whom had been ready, willing and able to purchase the property for \$210,000, and by reason of that fact the plaintiff had sustained damage to the extent of \$100,000, for which judgment was demanded.

The answer, after setting up certain denials, alleged, among others, as a separate defense, the Statute of Limitations. The plaintiff demurred to this defense and the defendant thereupon made a motion for judgment upon the pleadings. The motion was denied and the appeal is from the order.

The defendant, by moving for judgment upon the pleadings, admitted the truth of the facts alleged in the complaint. (*Clark v. Levy*, 130 App. Div. 389; *Ship v. Fridenberg*, 132 id. 782.) But, notwithstanding such admission, I am of the opinion that the motion should have been granted, because the complaint does not state facts sufficient to constitute a cause of action. A complaint, in order to constitute a cause of action for slander of title, must not only allege that the statement complained of was false and published maliciously, but that pecuniary damage resulted to the plaintiff by reason thereof. (*Kendall v. Stone*, 5 N. Y. 14.) The facts pleaded by the plaintiff do not show that he has suffered any pecuniary damage whatever as the direct result of the defendant's acts. It is true, the complaint alleges, that the plaintiff was unable to consummate the sale of the property to the Nova Realty Company on account of the false statements, but in connection therewith it is alleged that prior to the false statements the Nova Realty Company had entered into a written contract to purchase, and the plaintiff to sell to it, the real estate referred to, and that such contract was in force at the time the alleged statements were made. This contract the plaintiff could have compelled the realty company to specifically perform. It was under a legal obligation to do so, notwithstanding the defendant's statement and the fact that it refused to carry out its contract was not chargeable to the defendant. The court at Special Term recognized the force of this rule, but held the

App. Div.] First Department, February, 1912.

complaint to be sufficient because there were allegations in it to the effect that the plaintiff was prevented from selling the property not only to the realty company but to Walter E. Preble and others, who were able and willing to buy it. The complaint shows that the statement alleged to have been made was made after the plaintiff had entered into the contract with the realty company and while that contract was in force; therefore, had the plaintiff desired, at the time the statement was made, to sell to Preble or others, he could not have done so by reason of the contract with the realty company. The realty company is alleged to have been able to make the purchase. Plaintiff could, notwithstanding the statement, have compelled it to specifically perform, and in that case no damages would have been sustained.

Kendall v. Stone (supra) is directly in point. There it was sought to recover damages for false representations concerning the plaintiff's title to land on account of which "divers good citizens, and especially one Asa H. Wheeler, were deterred from purchasing the lands in question and the plaintiff was prevented from disposing of the same and thereby deprived of the advantages to be derived from the sale thereof." It appeared that prior to the alleged slander of title Wheeler had entered into a contract with the plaintiff for the purchase of the land, which contract was in force at the time of the publication. It was held that the action could not be maintained because the plaintiff had not been damaged by the defendant's act. "The agreement," says the court, "was obligatory upon both parties. Either could have enforced a specific performance in equity and thereby attained the precise result contemplated by the contract. Under these circumstances the representations charged were made by the defendant. The effect of them was not to prevent a sale of the land, for that had been secured by the existing contract." This authority has since been followed and was cited with approval as late as the 186 New York, 437 (*Reporters' Assn. v. Sun Printing & Publishing Assn.*) (See, also, *Townsh. Slan.* [3d ed.] 337.)

Defendant's statement as to the mortgage being due did not justify the realty company in breaking its contract with the

First Department, February, 1912.

[Vol. 149.]

plaintiff, nor could the plaintiff release the realty company therefrom and then recover from the defendant the damages which he had sustained.

The order appealed from, therefore, is reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

INGRAHAM, P. J., LAUGHLIN, MILLER and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

PEOPLE'S NATIONAL BANK OF HACKENSACK, Appellant, *v.*
CLARENCE B. RICE and LOUIS R. HUNTER, Respondents.

First Department, February 2, 1912.

Bills and notes — action by holder — deposit with holder of amount of note by indorser to secure collection — real party in interest.

Whether as between an indorser and the holder of a note the latter has been secured or paid is no concern of the maker in an action on the note beyond the inquiry whether he may become liable to different persons for the same debt and encounter the danger of paying it twice.

The holder of a note with which an indorser had deposited the full amount thereof as security for its collection may maintain an action against the maker thereof, and it is error to dismiss the complaint on the ground that plaintiff, having been paid, was not the real party in interest.

APPEAL by the plaintiff, the People's National Bank of Hackensack, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 9th day of December, 1910, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case on a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 3d day of December, 1910, denying the plaintiff's motion for a new trial made upon the minutes.

App. Div.] First Department, February, 1912.

Herbert B. Shoemaker, for the appellant.

Elisha B. Powell, for the respondents.

SCOTT, J.:

Plaintiff appeals from a judgment in favor of defendants entered upon a nonsuit.

The action is upon a promissory note made by defendants to the order of Oliver Brothers' Purchasing Company, by whom it was indorsed and transferred to plaintiff for value and as alleged before maturity. Upon the trial plaintiff produced the note and proved that it had discounted it on October 10, 1907, paying full value therefor, and that the amount paid was credited to the account of the copartnership of Oliver Brothers, because the purchasing company, the payee named in the note, had no account with plaintiff. The note matured on March 9, 1908, and was not paid, whereupon, at the request of one of the firm of Oliver Brothers, plaintiff agreed to sue the makers, on condition that the indorser would deposit collateral, and would pay or guarantee the costs and expenses of the action. Said member of the firm of Oliver Brothers thereupon gave plaintiff a check for the amount due on the note as collateral security for its collection. This check was accepted and collected by plaintiff which holds the proceeds. Upon the trial, upon this state of facts, the complaint was dismissed upon the ground that plaintiff was not the real party in interest, the court being of the opinion that the deposit of the cash collateral amounted to a payment of the note so far as concerned plaintiff. This was clear error. The plaintiff still remained the holder of the note, and as such is entitled to collect it from the makers. Whether as between the indorser and the holder, the latter has been secured or paid is no concern of the maker beyond the inquiry whether he may become liable to different persons for the same debt, and encounter the danger of paying it twice. There is no such peril here present for a judgment in favor of the holder, the plaintiff, would be a bar to any other suit on the same note, and payment to the holder would discharge the note utterly. (*Madison Square Bank v. Pierce*, 137 N. Y. 444; *Twelfth Ward*

Bank v. Brooks, 63 App. Div. 220; *Hays v. Hathorn*, 74 N.Y. 486.)

The judgment must be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

FRANCIS R. PEMBERTON, Respondent, *v.* WILLIAM G. McADOO, Appellant.

First Department, February 2, 1912.

Practice — separate trial of issues — partnership — action to recover part of mutual debt paid by one party — defense of mutual accounting and settlement.

It is correct practice in a proper case to order a separate trial of one issue prior to the trial of the other issues.

Where a complaint alleges that the parties were formerly partners in business; that upon a certain date they agreed upon a statement of their assets and accounts and agreed that a certain debt should be paid in part by notes; that thereafter the firm assets were divided, but the outstanding notes were overlooked and were subsequently paid by plaintiff, who seeks to recover one-half the amount thereof, and there is no allegation that there was ever any settled account made between the parties, but the complaint proceeds as if none had ever been made, and the answer as a separate defense sets up that after the mutual statement alleged in the complaint the parties continued in business for three years, at which time the assets were divided and the parties "mutually agreed and intended that said division should operate as a dissolution of said firm, and a final settlement of their respective interests in the said firm and its property and assets, and of all claims and other matters" between the parties, the issue raised by said separate defense should be tried before the other issues.

It is manifest that, if the decision on this issue should be in defendant's favor, the litigation would be at an end, for, if the accounts had been finally settled by mutual consent it is too late for plaintiff to assert a claim against defendant arising out of the partnership affairs included in the settlement unless the settlement itself be first attacked and set aside.

App. Div.] First Department, February, 1912.

APPEAL by the defendant, William G. McAdoo, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of November, 1911, denying the defendant's motion for a separate trial of a single issue in advance of the trial of the other issues.

Thomas D. Thacher, for the appellant.

Louis S. Posner, for the respondent.

SCOTT, J.:

This is an appeal from an order denying defendant's motion for a separate trial of one of the issues prior to the trial of the other issues. Such an order in a proper case is distinctly provided for by section 973 of the Code of Civil Procedure, and the practice has been approved by this court and the Court of Appeals. (*Smith v. Western Pacific R. Co.*, 144 App. Div. 180; affd., 203 N. Y. 499.)

In the present action the complaint alleges that plaintiff and defendant were copartners in business, and that in May, 1899, they agreed upon a statement of their partnership assets and accounts down to that date; that by this statement it was agreed that a certain debt owed by plaintiff to one Harrison should be paid out of the partnership assets as follows: \$12,000 in cash and \$15,000 in three notes of \$5,000 each, payable September 1, 1901, September 1, 1902, and September 1, 1903; that the cash payment and the first note were paid out of the partnership assets; that thereafter the firm assets were divided, but such division was made in oversight by plaintiff that there were outstanding two notes which should have been paid out of the firm assets; that these notes were afterwards paid by plaintiff; that the firm assets so divided much exceeded the sum of \$10,000 represented by said two notes. Upon this statement of facts plaintiff's claim is that he should recover \$5,000, with interest, being the amount which, as it is claimed, defendant was overpaid.

It is to be observed that the complaint does not allege that the accounts between the partners were adjusted and settled when the firm assets were divided. The answer, by way of a

separate defense, sets up that after the mutual statement of 1899, the parties continued in business as copartners until May, 1902, when the assets were divided, and that at the time of said division the plaintiff and defendant "mutually agreed and intended that said division should operate as a dissolution of said firm, and a final settlement of their respective interests in the said firm and its property and assets, and of all claims and other matters between the plaintiff and defendant relating to said partnership."

It is the issue raised by this defense that defendant desires to try separately and before the trial of the other issues.

It is manifest that if such a trial should be had and should result favorably to defendant, this litigation would be at an end and there would be no occasion for going into the probably long and involved trial of the other issues.

If the accounts between the parties were finally settled by mutual consent in May, 1902, it is too late for one party to assert a claim against the other arising out of the partnership affairs included in the settlement, unless the settlement itself be first attacked and set aside. The complaint does not seek to set aside any settled account between the parties, nor does it contain the necessary allegations to avoid such a settlement if one was made. It ignores any such settlement, and proceeds as if none had been made. As the pleadings now stand, if one was made as defendant avers, the complaint is answered. In support of its plea of a final settlement of the mutual accounts, defendant now exhibits and proposes to prove on the trial the record of a final judgment in an action between these same parties wherein it was adjudged *inter alia* that at the time of the division of the firm assets the "accounts between the plaintiff and defendant relating to the affairs of said firm were finally and completely settled," and "that there was no fraud or mistake in the division of said property and assets or the settlement of said accounts."

This record defendant proposes to introduce as conclusive evidence in support of his plea that the accounts were finally settled and stated. So far as we can now see it would be such evidence, for plaintiff does not disclose, nor is he now called upon to do so, how he expects to meet the separate defense.

App. Div.] First Department, February, 1912.

As the matter comes before us on this appeal this appears to be a peculiarly appropriate case for the application of section 973 of the Code of Civil Procedure. The order appealed from is, therefore, reversed, with ten dollars costs and disbursements, and the motion granted that the issues raised by the "further defense" contained in the answer, constituting paragraph 5 of said answer, be separately tried prior to any trial of the other issues in the case.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted to extent stated in opinion.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent, *v.* JOSEPH FLEISCHMAN and Others, Respondents, Impleaded with CHARLES L. GREENHALL, as Trustee in Bankruptcy of JOSEPH FLEISCHMAN, Appellant.

First Department, February 2, 1912.

Mortgage — foreclosure — bankruptcy of mortgagor — appointment of receiver — rights of trustee in bankruptcy — stay — remitting action to Federal court — equity.

The fact that the trustee in bankruptcy of a mortgagor has commenced a suit in equity in the United States District Court to set aside as fraudulent a conveyance of the mortgaged premises by the bankrupt, to which action, however, he did not make the holder of the mortgage a party and the fact that an interlocutory judgment has been rendered in his favor in such action is no reason for vacating an order appointing a receiver of the mortgaged premises in a suit of foreclosure brought in the State court. The rule that where a court of equity of competent jurisdiction has assumed jurisdiction of the subject-matter of a litigation it is entitled to retain the same to the exclusion of all other courts, has no application. The subject-matter of the litigation in the District Court is merely the title to the property subject to the mortgage, that is, the equity of redemption.

The trustee in bankruptcy by omitting to make the holder of the mortgage a party to the suit in the District Court rendered it impossible for it to protect its rights by the decree in that suit.

There is no authority for remitting the foreclosure action to the Federal court.

First Department, February, 1912.

[Vol. 149.]

APPEAL by the defendant, Charles L. Greenhall, as trustee, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of December, 1911, as resettled.

Clarence R. Freeman, for the appellant.

Charles L. Griffin, for the respondents.

SCOTT, J.:

This is an appeal from an order denying a motion by the appellant, as trustee in bankruptcy of Joseph Fleischman, a bankrupt, to set aside and vacate an order appointing a receiver of mortgaged premises. The appellant at the same time moved that the action be remitted to the United States District Court.

The action is for the foreclosure of a mortgage made on the 15th day of February, 1905, by Joseph Fleischman and wife to the County Holding Company, by that company assigned to the Lawyers' Title Insurance Company, and by the latter company assigned to plaintiff. The mortgage covers real estate situate in the city of New York and contains a clause providing for the appointment of a receiver of the rents and profits in case of default by the mortgagor. Such default has occurred and this action having been begun, a receiver was duly appointed. Subsequent to making the above mentioned mortgage Joseph Fleischman, the mortgagor, became a bankrupt, and the appellant was appointed his trustee in bankruptcy. It appears that Fleischman, after making the mortgage, conveyed the mortgaged property to the National Centre Realty Company, taking in payment therefor the stock of said realty company, which stock passed to the trustee in bankruptcy of said Fleischman. It also appears that the National Centre Realty Company has transferred the real estate to one Robert B. Moorhead, in trust for the Carnegie Trust Company. This conveyance the trustee in bankruptcy deemed to be fraudulent, and on December 27, 1909, he commenced an action in equity in the United States District Court for the Southern District of New York to set aside the last-named conveyance.

App. Div.]

First Department, February, 1912.

To that action plaintiff was not made a party, and it has proceeded to an interlocutory decree declaring the said conveyance to have been fraudulent and void as to the trustee in bankruptcy and others as stockholders of the National Centre Realty Company, but making no reference to or provision for plaintiff's mortgage. The appellant invokes the familiar rule that when one court of equity of competent jurisdiction has assumed jurisdiction over the subject-matter of a litigation, it is entitled to retain the same to the exclusion of all other courts. The rule is well enough settled, but the difficulty lies in its application. The subject-matter of the litigation in the Federal court is the title to the real estate subject to plaintiff's mortgage, and all that can be reached by a decree in that case, or is sought to be so reached, is what we are accustomed to call, inaccurately perhaps, the equity of redemption. The plaintiff here is not concerned with the question of title. It is indifferent whether the title be found to be in Moorhead, or in the National Centre Realty Company. All it seeks is to enforce its mortgage lien and collect its debt. Whether the Federal court finds the true title to be in the realty company or in Moorhead is unimportant for whichever has it holds it subject to the lien of plaintiff's mortgage. The trustee in bankruptcy, by his own act in omitting to make plaintiff a party to the action in the Federal court, has rendered it impossible to protect plaintiff's rights by the decree in that action. We see no conflict of jurisdiction between the Federal court and this. Notwithstanding the foreclosure of the mortgage the final decree to be made in the Federal court will dispose of all that it could dispose of in any case, that is the property or its proceeds, after the mortgage has been satisfied. The appellant somewhat confuses the issue by his constant reference to the trustee's action as one pending in the bankruptcy court. It would be more accurate to speak of it as pending in a court which has jurisdiction of bankruptcy proceedings. The aid of the Federal court is invoked not as a bankruptcy court, but as a court of equity. The proceeding is not a proceeding in bankruptcy but an action in equity to enhance the value of the bankrupt's estate. It might equally well have been brought in a State court. There is no authority for remitting the

First Department, February, 1912.

[Vol. 149.]

action to the Federal court, and so the appellant appears to concede for he does not argue that point.

The order should be affirmed, with ten dollars costs and disbursements.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

SAN REMO COPPER MINING COMPANY, Appellant, *v.* ELIE J. MONEUSE, Respondent.

First Department, February 2, 1912.

Contract — agreement to advance money to corporation — provision for appointment of lender's nominees to office — enforcement of contract — definiteness.

Where a person agreed in consideration of a transfer to himself of over eighty per cent of its stock to advance to a West Virginia mining company sufficient money to redeem its property from a foreclosure sale and to furnish other money as required from time to time to operate its mines until they should yield sufficient returns to pay for working them, a provision in the contract that after the redemption of the property the secretary and treasurer of the company would resign and the directors would appoint the individuals nominated by such person to the vacant positions and that a stockholders' meeting would then be called and a new board of directors elected is not a vital part of the contract and does not destroy its validity so as to constitute a defense to an action by the company to recover damages for its breach.

Such provision is merely incidental and was for the benefit of the individual who did not have to avail himself of it if he did not desire to do so.

Nor was the contract to advance so much money as would put the mines in a condition "to pay for working and operating the same" so indefinite as to render it unenforceable.

APPEAL by the plaintiff, the San Remo Copper Mining Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of September, 1911, denying the plaintiff's motion for an order overruling a demurrer to the amended complaint; also from an order entered in said

App. Div.] First Department, February, 1912.

clerk's office on the same day granting the defendant's cross-motion for judgment on the pleadings, and also from a judgment entered on the 14th day of September, 1911, pursuant to said order.

James F. Mack, for the appellant.

Barnett L. Hollander, for the respondent.

SCOTT, J.:

Plaintiff appeals from an order denying its motion to overrule a demurrer to the complaint and from an order granting defendant's motion for judgment upon the pleadings. The action is for damages for defendant's failure to comply with a written contract which is annexed to the complaint. The demurrer is for general insufficiency.

The complaint shows that plaintiff is organized with a capital stock divided into 500,000 shares of which it had issued, when the contract was executed, 79,935 shares and had on hand 420,065 shares. It owned certain mining claims in the town of Gleason, Ariz., and owned certain other claims and a mill. These latter claims and the mill had been sold under foreclosure for \$30,050, but could be redeemed at any time prior to July 27, 1905. Under these circumstances plaintiff and defendant, on April 28, 1905, entered into a contract reciting the foregoing facts. Defendant agreed to furnish sufficient money to cause the mining claims, mill sites and mill to be redeemed in the name of plaintiff from said foreclosure sale, and further agreed "to furnish sufficient money as required from time to time to operate the said mines and mining claims until said mines and mining claims shall yield sufficient returns to pay for working and operating the same."

In return for the money thus to be furnished, and in consideration of defendant's agreement so to furnish it, plaintiff agreed to deliver to defendant the 420,065 shares of its capital stock still unissued as his absolute property. This stock was to be so delivered to him when he should have redeemed the property from the foreclosure sale, and it was agreed that then the present secretary and treasurer of plaintiff would resign, and the board of directors would appoint any person or persons to

First Department, February, 1912.

[Vol. 149.]

said offices that defendant should nominate, and that a stockholders' meeting would then be called and a new board of directors elected. The defendant did not furnish the money to redeem the foreclosed mining claims and mill, and they were consequently lost to plaintiff. Naturally the agreement then fell through. The Special Term was of opinion that the whole agreement was invalid and unenforceable because of the agreement that when defendant had acquired a vast majority of the stock of the company, the then secretary and treasurer would resign and the board of directors would appoint defendant's nominees to such positions. This was deemed to be contrary to the public policy of this State as expressed in section 30 of the Stock Corporation Law (Consol. Laws, chap. 59; Laws of 1909, chap. 61), which re-enacted section 27 of the former Stock Corporation Law (Gen. Laws, chap. 36; Laws of 1892, chap. 688), and which provides that the board of directors shall appoint the officers of a corporation, the argument being that it was contrary to the statute and to the public policy of the State for a corporation to agree that its board of managers could surrender their discretion in the matter of appointing officers or employees.

It is perhaps a sufficient answer to this suggestion to note that plaintiff is a West Virginia corporation, and controlled, so far as its internal management is concerned, by the statutes of that State. What these statutes provide as to the appointment of officers does not appear. But, apart from this, the provision to which exception was taken at Special Term is not a vital part of the contract, but merely an incidental provision inserted for defendant's benefit, and of which he need not have availed himself if he had not desired to do so. He was about to become, if he carried out his agreement, the owner of an overwhelming proportion of the capital stock which would give him, without any special agreement, the absolute control of the corporation, with power to elect a board of directors, and in effect to dictate who should be its officers and employees. It certainly did not destroy the validity of the contract that by one of its terms defendant was to be invested with this power of control at once, upon acquiring the stock, instead of waiting for the next annual meeting. It is further objected that

App. Div.] First Department, February, 1912.

the contract is too indefinite as to the obligations assumed by defendant to render it enforceable. There was nothing indefinite about the promise to furnish sufficient money to redeem the property from the foreclosure sale. The amount required for that purpose was definitely fixed. Of course the amount which it would be necessary to expend in developing the property was necessarily left indefinite, but the test of the amount to be furnished or advanced is perfectly definite. So much was to be furnished as would put the mines and mining claims in a condition "to pay for working and operating the same." In our opinion the complaint stated a sufficient cause of action. The order appealed from must, therefore, be reversed, with ten dollars costs and disbursements, and the defendant's motion for judgment on the pleadings denied, with ten dollars costs. Plaintiff's motion that the demurrer to the complaint be overruled is granted, with ten dollars costs, with leave to defendant to withdraw his demurrer and answer within twenty days upon payment of the foregoing costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and defendant's motion denied, with ten dollars costs, and plaintiff's motion granted, with ten dollars costs, with leave to defendant to withdraw demurrer and to answer on payment of costs.

THOMAS M. MULRY and JAMES J. LARKIN, as Executors, etc., of JOHN FLEMING, Deceased, Respondents, v. JOHN C. R. ECKERSON, Appellant.

First Department, February 2, 1912.

Guaranty and suretyship—dissolution of partnership—undertaking by remaining partner to pay firm debts—action against surety—proof of judgments against firm.

A judgment against a principal is not even evidence against his surety unless the latter had notice of the suit and an opportunity to defend, except in the case of a covenant to indemnify against the consequences of a suit.

First Department, February, 1912.

[Vol. 149.]

Thus, in an action against the surety on an undertaking given on the dissolution of a partnership providing that the remaining partner "shall well and truly pay * * * all commercial debts and bills payable by said copartnership," it is reversible error to permit plaintiff to prove over objection and exception that judgments had been recovered against the partnership subsequent to the giving of the undertaking.

Where there was no attempt to prove either the existence of claims covered by the undertaking or that the defendant had notice of the suits in which the judgments were recovered a judgment in plaintiff's favor will be reversed.

APPEAL by the defendant, John C. R. Eckerson, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 7th day of January, 1911, upon the report of a referee appointed to hear and determine the issues.

William J. Wallace, for the appellant.

Arthur J. McClure, for the respondents.

MILLER, J.:

The plaintiff's testator, John Fleming, and Charles A. Brown were copartners. Fleming sold his interest to Brown and the latter assumed and agreed to pay the copartnership debts. The defendant joined him in an undertaking to Fleming, the condition of which was: "The said Charles A. Brown shall well and truly pay within six months from the date hereof all commercial debts and bills payable by said copartnership of Brown & Fleming and the expenses and debts of said James J. Coogan, as receiver of the property of Brown & Fleming, other than claims in judgment and in tort, and also claims upon notes upon which the copartnership of Brown & Fleming was accommodation endorsers." This action is brought on that undertaking. The complaint alleged the existence of certain partnership debts stated, the failure of Brown to pay, the commencement of actions against Brown & Fleming, notice thereof to the defendant, and the recovery of judgments therein. The answer denied the existence of debts covered by the undertaking and the notice of the actions. On the trial the plaintiffs were permitted to prove, over the defendant's objection and exception, the judgments recovered against Brown & Fleming, and upon that proof was given a judgment for \$49,496.52 damages.

App. Div.]

First Department, February, 1912.

It is the law in this State that a judgment against the principal is not even evidence against his surety unless the latter had notice of the suit and an opportunity to defend. (*Douglass v. Howland*, 24 Wend. 35; *Berry v. Schaad*, 50 App. Div. 132; *Loewer's Gambrinus Brewing Co. v. Lithauer*, 43 Misc. Rep. 683.) The exception is where the covenant is to indemnify against the consequences of a suit. (See *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275.)

There was no attempt to prove either the existence of claims covered by the undertaking, with one exception, or that the defendant had notice of the suits in which the judgments were recovered.

The judgment should be reversed and a new trial ordered before another referee, with costs to appellant to abide the event.

INGRAHAM, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment reversed, new trial ordered before another referee, with costs to appellant to abide event. Order to be settled on notice.

CHARLES FAIRCHILD, as Administrator, etc., of TERRA FAIRCHILD, Deceased, Respondent, v. JOHN P. LEO, Appellant.

First Department, February 2, 1912.

Negligence — landlord and tenant — fall through fire escape — death — pleading — failure to set forth facts showing landlord's duty.

Where in a negligence action plaintiff claims that defendant violated some duty, facts showing the existence of the duty or obligation must be pleaded and proved.

In an action against the owner of a tenement to recover for the death of plaintiff's intestate, who fell through an opening in the fire escape while hanging out clothes on a clothes dryer attached to the rear wall of the tenement, it is necessary to plead and prove facts showing that defendant owed plaintiff's intestate some duty with respect to the maintenance of the clothes dryer and fire escape.

A general averment that defendant owed a particular duty or that the deceased was lawfully on the premises is insufficient.

First Department, February, 1912.

[Vol. 149.]

Where the complaint nowhere alleges that the deceased was a tenant of one of the rear apartments or the servant of such a tenant and alleges no other facts showing defendant's duty to her in regard to the premises, a motion by defendant for judgment on the pleadings should be granted.

While pleadings are to be liberally construed it is necessary that all essential facts be alleged.

The court will not infer that the deceased was the servant of a tenant where no fact is stated from which the inference could be drawn.

It seems, that negligence could not be predicated upon defendant's failure to guard the opening in the fire escape but that the attachment of the clothes dryer to the wall so that one using it might fall through the opening in the fire escape might be either itself negligence or present a situation calling on defendant to exercise care to prevent an accident.

APPEAL by the defendant, John P. Leo, from an order of the Supreme Court, made at the New York Special Term, bearing date the 26th day of October, 1911, and entered in the office of the clerk of the county of New York, resettling an order bearing date the 14th day of October, 1911, and entered in said clerk's office, denying the defendant's motion for judgment on the pleadings.

J. Brewster Roe, for the appellant.

Abraham Oberstein, for the respondent.

MILLER, J.:

The complaint alleges that the defendant was the owner and in control of a tenement house occupied by different tenants as a place of abode; that there were fire escapes in the rear of and appurtenant to said premises under the defendant's charge, care and control; that in front of the apartment of one of the defendant's tenants, which was on the second floor, rear, of said premises, there was a clothes dryer, attached to the rear wall in close proximity and partly attached to the fire escape, which was kept and maintained by the defendant and was under his direction and control; that it was used in common by the tenants of the rear apartments for the purpose of hanging and drying clothes; that while the plaintiff's intestate was "lawfully, properly and carefully upon and using the said fire escape * * * and engaged in hanging clothes on the aforesaid Hill's Clothes Dryer, * * * she suddenly and

without any warning or notice fell into and through a large opening in the said fire escape upon and against a stone platform in the yard below, causing her to sustain injuries which resulted in her death;" and that said occurrence was due "wholly to the negligence and carelessness of the defendant in causing and permitting the said fire escape to be and remain in an unsafe, improper, unsuitable and dangerous condition; in causing and permitting the said Hill's Clothes Dryer to be and remain in close proximity and partly attached to and incumbering the said fire escape; in failing to have the said opening in said fire escape properly or safely guarded or protected so as to prevent injury to anyone lawfully using the said fire escape and the said Hill's Clothes Dryer appurtenant thereto; in causing and permitting the said opening in the said fire escape to be and remain in close and dangerous proximity to the said Hill's Clothes Dryer; in violating the provisions of the statute commonly known as the Tenement House Act of the State of New York; in violating the provisions of the Building Code of the City of New York pertaining to fire escapes, and in other respects in failing to exercise reasonable care, diligence and prudence in the premises, and that the plaintiff's intestate was entirely free from fault or negligence in the premises on her part."

It is difficult to see how negligence can be predicated upon the failure to guard the opening in the fire escape to which, of course, free access must be allowed and which the statute does not permit to be covered. (Tenement House Law [Consol. Laws, chap. 61; Laws of 1909, chap. 99], § 16, as amd. by Laws of 1909, chap. 354.) However, it may be possible that the attachment of the clothes dryer to the fire escape in such a manner that a person using it might fall through the opening was either itself negligence or presented a situation calling upon the defendant to exercise some care to prevent such a casualty. It is impossible to determine that question, without knowing precisely what the situation was, and it may be that under the averments of negligence above quoted the plaintiff may be able to prove some act or omission constituting negligence. The authorities bearing upon the question as to what

First Department, February, 1912.

[Vol. 149.]

constitutes a sufficient averment of negligence are collated, and the rule to be deduced from them is plainly stated by Mr. Justice THOMAS in *Pagnillo v. Mack Paving & Construction Co.* (142 App. Div. 491). The learned counsel for the appellant virtually concedes that the averments of negligence are sufficient. He states in his brief: "The question is not whether defendant was guilty of negligence in the construction or maintenance of fire escapes or clothes dryers on his premises, but whether the complaint alleges facts showing that defendant was under any imposed duty to plaintiff's intestate to exercise care in the construction or maintenance of the fire escapes or dryers."

It is undoubtedly the rule that, where a violation of duty is claimed, the existence of the duty or obligation must be shown. It was, therefore, necessary for the plaintiff to plead facts from which it could be inferred that the defendant owed the plaintiff's intestate some duty with respect to the maintenance of the clothes dryer and fire escape. A general averment that the defendant owed a particular duty or that the plaintiff's intestate was lawfully on the defendant's premises would not suffice. (*City of Buffalo v. Holloway*, 7 N. Y. 493; *Petty v. Emery*, 96 App. Div. 35.) It is averred that the clothes dryer was used in common by the tenants of the rear apartments. It doubtless might be inferred from that averment that the defendant owed a duty to those tenants and their servants to maintain it in a reasonably safe condition. But the complaint nowhere alleges that the plaintiff's intestate was a tenant of one of the rear apartments or the servant of one of such tenants. The plaintiff asks us to infer that his intestate was a servant of the tenant in the front of whose apartment the dryer was attached, but there is no fact stated from which that fact is to be inferred unless we indulge in supposition. If it was the fact it could easily have been stated, and, while pleadings are liberally construed, it is still necessary that all the essential ultimate facts be stated so that the court may determine whether, if the statements are true, the plaintiff has a cause of action, and the defendant may be informed of what he is to meet. We cannot supply an essential fact by supposition or guesswork. If the plaintiff's intestate was a mere

App. Div.] First Department, February, 1912.

licensee, the facts stated are insufficient to show that the defendant omitted to perform any duty which he owed her.

The order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

ELIZABETH M. BECK, Appellant, *v.* JOHN STAUDT, as Executor, etc., of JOSEPH HUBER, also Known as JOSEPH HUBER, JR., Deceased, and Others, Respondents.

First Department, February 2, 1912.

Gift — deposit of bonds in envelope addressed to donee.

The fact that a testator before his death placed certain unregistered bonds in an envelope, across the face of which he wrote, "The property of Miss Lizzie Beck, 842 Forest Avenue, N. Y.", and placed the envelope in his safe deposit box to which he alone had access, does not establish a gift of the bonds to the person whose name appears on the envelope. The courts will not consummate the attempted transfer by constructing a trust, for to do so would defeat the Statute of Wills.

APPEAL by the plaintiff, Elizabeth M. Beck, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 19th day of May, 1911, upon the decision of the court rendered after a trial at the New York Special Term.

Edward W. S. Johnston, for the appellant.

Gustav Lange, Jr., for the respondent Staudt.

George H. Taylor, Jr., for the respondents Huber and others.

MILLER, J.:

Joseph Huber, the defendants' testator, purchased ten unregistered bonds of the Brooklyn Union Elevated Railroad Company. Upon his death the bonds were found in his safe deposit

First Department, February, 1912.

[Vol. 149.]

box in an envelope across the face of which was written in his handwriting the words: "The property of Miss Lizzie Beck, 842 Forest Avenue, N. Y." He alone had access to the box. The plaintiff seeks to recover the bonds on the theory that he at least created a tentative trust for her which, upon his death, becomes irrevocable.

The opinion of Mr. Justice LEHMAN, who decided the case at Special Term, adequately deals with the question involved. We agree with the views well expressed by him, and desire only to point out a distinction between this and the case of *Govin v. De Miranda* (140 N. Y. 474), which appears to have been overlooked. That case was decided solely upon the written declaration of the testator to the effect that certain bonds belonged to the plaintiffs. There being nothing to explain or contradict, it was assumed that it was true and that the bonds "came to the ownership of the plaintiffs in some legal way—by purchase or gift from some one." The serious question considered in the case was whether the positive declaration that the bonds belonged to the plaintiffs was qualified by the last clause of the statement, viz., "No person shall have the right to oppose this declaration, because it is founded on conscience and justice. I reserve this money only for what I may consider proper." It was held that all of the statements contained in the declaration must be harmonized if possible and that, reading them together it was to be assumed in the absence of proof to the contrary that the bonds were the property of the plaintiffs, as the testator had unequivocally declared, and that they were in his possession "under some agency or possibly upon some trust." In this case the established facts are that the testator was himself the owner of the bonds, and that he put them in an envelope, wrote across the face of it the words first-above quoted, and deposited them in his safe deposit box to which no one else had access. Concededly, the essential element of delivery to constitute a gift was wanting. The court found, what the surrounding circumstances indicate was the fact, that the testator intended his declaration to speak only from his death. He doubtless supposed that he could thus make a testamentary disposition, but there is nothing to suggest that he intended a trust, and the courts should not

App. Div.] First Department, February, 1912.

defeat the Statute of Wills by constructing trusts. This case is not distinguishable from *Gegan v. Union Trust Co.* (129 App. Div. 184; affd., 198 N. Y. 541), except that there was evidence in that case tending to indicate that the testator supposed that the attempted gift had become effectual during his lifetime. The grounds upon which the learned counsel for the appellant attempts to distinguish that case appear to us to be altogether too unsubstantial to justify the attempted distinction.

The judgment should be affirmed, with costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and DOWLING, JJ., concurred.

Judgment affirmed, with costs.

PAULINE BORNSTEIN, as Administratrix, etc., of BRUCHA FRIEDA GOLDMAN, Deceased, Appellant, *v.* BENI FADEN and MARY FADEN, Respondents.

First Department, February 2, 1912.

Landlord and tenant — negligence — death caused by failure to light stairways in tenement house — erroneous nonsuit — objection not taken at trial — Tenement House Law construed — proof raising question for jury.

Action against the owner of a tenement house to recover for the death of a tenant caused by the alleged negligence of the defendant in failing to light the public hallways and the second floor of the building as required by section 76 of the Tenement House Law. Evidence examined, and held, that a nonsuit at the close of the plaintiff's case was error.

The defendant cannot on appeal sustain the judgment entered on such nonsuit upon the ground that the plaintiff failed to prove that tenants cooked in their apartments so as to make the building a tenement house within the provisions of the statute if no such point was made at trial. It was not contributory negligence as a matter of law for the decedent to use the stairway of the tenement knowing that it was not lighted, for she had a right to use it.

Where the evidence shows that the decedent while attempting to descend an unlighted stairway leading to the entrance of the tenement fell and was killed, her contributory negligence was a question for the jury.

The Legislature, in requiring that a "proper light" be kept burning in a public hallway near the stairs upon the entrance floor of tenement houses,

First Department, February, 1912.

[Vol. 149.]

intended that the owner should provide illumination sufficient to light the entire lower stairway, so that persons using the stairs by the exercise of care could see the stairs and avoid stumbling or missing their foothold. Where it appears that no such light was provided during the hours required by the statute, the negligence of the landlord is a question of fact for the jury.

MC LAUGHLIN and MILLER, JJ., dissented, with opinion.

APPEAL by the plaintiff, Pauline Bornstein, as administratrix, etc., from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 26th day of May, 1911, upon the dismissal of the complaint at the close of plaintiff's case on a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 21st day of June, 1911, denying the plaintiff's motion for a new trial made upon the minutes.

L. B. Boudin, for the appellant.

Walter G. Evans, for the respondents.

LAUGHLIN, J.:

This is a statutory action to recover for the death of Brucha Frieda Goldman, alleged to have been caused by the negligence of the defendants in failing to light the hallways of the tenement building known as No. 14 Clinton street, borough of Manhattan, New York, between sunset and sunrise, as required by the provisions of section 82 of the Tenement House Act (Laws of 1901, chap. 334), which was re-enacted by section 76 of the Tenement House Law (Consol. Laws, chap. 61; Laws of 1909, chap. 99.)* The defendants were the owners of the premises and building, which was a six-story tenement house with three apartments on each floor. The decedent resided with relatives in one of the apartments on the second floor, being the first floor above the ground floor. She was seventeen years of age, and was well and strong and sewed by hand as a piece worker for a living. The second floor was connected with the entrance hallway on the ground floor by a stairway consisting of sixteen steps. Shortly before sunrise on February 2, 1909, the decedent was on her way from the apartment, of which she was one of the occupants, to the street, and

* Since amd. by Laws of 1911, chap. 388.--[REP.]

App. Div.]

First Department, February, 1912.

to do this she was obliged first to pass easterly along the hallway, separated from the stairway by a railing, and then to turn to her right and go down one or two steps to a platform or landing at the head of the main stairs and then after still further turning to her right to proceed westerly down to the street. There was no light in the hall on the second floor, and the lower hall was not lighted. The only eye witness to the accident came out of the apartment with the decedent and was within a few feet of her. She testified that the decedent was walking slowly with her hand on the railing or banister of the stairs, and that as she turned to go down the stairs she fell and that "when she slipped her foot, she hollered out."

The testimony of the eye witness tends to show that decedent did not fall until after she reached the landing or platform at the top of the main flight of stairs, but she could not tell whether decedent fell from the first or second step at the top of the main stairs; but she says that she saw decedent falling when four or five steps down. This witness gave further testimony tending to show that she saw the decedent slip "two or three or four steps below this platform," meaning the said landing or platform at the head of the main stairs which was one or two steps below the hall above, and she finally stated that decedent was a few steps below the landing when she saw her body falling, but that she did not know whether decedent "slipped on the top stair or on the next stair." The decedent fell to the foot of the stairs and struck her head and died as the result of the injuries sustained. The evidence further tended to show that it was quite dark in the hallway and on the stairs at the time of the accident, and immediately after the accident, in order to see to pick the decedent up and carry her back to her apartment, the gas in the lower hallway was lighted.

At the close of the plaintiff's evidence the complaint was dismissed on motion of counsel for the defendants on the grounds that plaintiff had failed to establish a cause of action or to show any negligence on the part of the defendants which was the proximate cause of the accident, or that decedent was free from contributory negligence.

We are of opinion that the evidence required the submission of the case to the jury. Section 82 of the Tenement House Act,

as re-enacted by section 76 of the Tenement House Law, provides as follows:

"Public halls. In every tenement house a proper light shall be kept burning by the owner in the public hallways, near the stairs, upon the entrance floor, and upon the second floor, above the entrance floor of said house, every night from sunset to sunrise throughout the year, and upon all other floors of the said house from sunset until ten o'clock in the evening."

Counsel for respondents attempts to sustain the judgment on the ground that it was not shown that the occupants of the eighteen apartments in this building did their cooking on the premises; which by the provisions of section 2 of the Tenement House Act, as re-enacted by section 2 of the Tenement House Law, was essential to constitute the building in question a tenement house. That precise point was not taken on the trial, and we are of opinion that it is not now available to the respondents. Moreover it is manifest that such proof could readily have been given, for it appears that decedent and those occupying the apartment with her were accustomed to go out early in the morning to get food for their breakfast, which is some indication that it was to be cooked in the apartment.

It was not contributory negligence as matter of law to use the stairway knowing that it was not lighted, for the decedent had a right to use it (*Brown v. Wittner*, 43 App. Div. 135); and this being a death case, the evidence sufficiently shows the exercise of proper care on the part of the decedent to require the submission of the question of her freedom from contributory negligence to the jury. There is no evidence that the stairs were obstructed or out of repair, and it is fairly to be inferred that they were not, as there is nothing to account for the accident other than possible want of care on the part of the decedent or inability on her part to see her way. The evidence tends to show that the decedent slipped; but I think it is not material whether she actually slipped, stumbled or missed a step, for whether her fall was due to slipping or stumbling or missing a step, the jury could have found that she was proceeding down the stairs carefully.

The question in the case requiring serious consideration is

App. Div.] First Department, February, 1912.

whether the mere fact that the statute was not complied with in respect to lighting the lower hallway is sufficient evidence of negligence on the part of the defendants to present a question of fact for the jury as to whether the violation of the statute was a proximate cause of the accident. We are of opinion that the Legislature in enacting this statute contemplated by the use of the words "proper light," that the light to be maintained in the lower hallways near the stairs on the entrance floor should be sufficient to light the entire lower stairway and to enable people lawfully using the stairs, by exercising proper care, to see the steps and avoid slipping, stumbling or missing their foothold. Tested by this rule the evidence of negligence on the part of the defendants was sufficient to take the case to the jury.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., and DOWLING, J., concurred; McLAUGHLIN and MILLER, JJ., dissented.

McLAUGHLIN, J. (dissenting):

I am unable to concur in the opinion of Mr. Justice LAUGHLIN. The absence of a light, being in violation of section 82 of the Tenement House Act (Laws of 1901, chap. 334), which was re-enacted by section 76 of the Tenement House Law (Consol. Laws, chap. 61; Laws of 1909, chap. 99),^{*} established, *prima facie*, the negligence of the defendants, but it does not follow that the fall of the intestate which resulted in her death was in any way due thereto. There is absolutely no proof in the record, as I read it, that permits even an inference that the absence of the light was the proximate cause of the intestate's fall. The only eye witness of the accident testified that the intestate "was walking by the banisters of the stairs by the railing, a railing like this (indicating). I noticed how she was walking; she was walking slow, ordinary walk; she had hold of the banister with her right hand. I was walking near the wall. I was just near her. There was no light at that time in the hall at all. She then turned at the stairs and fell down. I did not see;

* Since amd. by Laws of 1911, chap. 388.—[REP.]

First Department, February, 1912.

[Vol. 149.]

I heard her fall down. I heard the fall; I did not see it. When she slipped her foot, she hollered out. I heard her fall down."

Whether the fall were occasioned by an obstruction upon, or the condition of the stairs, her own carelessness, or the absence of the light, does not appear. One can conjecture that it was due to one of these causes as well as the other, but property cannot be taken from one person and given to another upon a mere guess. Its security rests upon a more substantial basis. It is a matter of common knowledge that people sometimes fall down stairs in broad daylight. Before a recovery can be had in an action to recover damages for negligence, there must be proof of causal connection between the negligence and the injury. While it is true, in case of death of the injured person, there being no eye witness of the occurrence, slight evidence may suffice, nevertheless, in all of these cases there must be some fact or circumstance proven from which an inference may be drawn that the deceased exercised due care. (*Schindler v. Welz & Zerweck*, 145 App. Div. 532; *Baumler v. Wilm*, 136 id. 857; *Jones v. Ryan*, 125 id. 282.)

The only fact which here appears is that the intestate, while attempting to go down the stairs, fell and sustained injuries from which she died shortly thereafter. I do not see how it can be said from such fact that there was any proof of the exercise of any care whatever on her part. Nor do I see how a recovery could be sustained if the plaintiff had had a verdict unless the rule that plaintiff must prove freedom from contributory negligence is to be abolished.

I am of the opinion that the complaint was properly dismissed and for that reason vote to affirm the judgment.

MILLER, J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

App. Div.] First Department, February, 1912.

GEORGE W. COLE and WILLIAM WOOP, Copartners, Trading as COLE AND WOOP, Respondents, *v.* CHARLES B. MANVILLE, Appellant.

First Department, February 2, 1912.

Sale — manufacture of automobile body to comply with specifications — failure to perform — rule of substantial performance inapplicable.

Action to recover the purchase price of an automobile body which the plaintiff was to manufacture according to specifications furnished by the defendant. Evidence examined, and *held*, that the body as manufactured did not comply with the specifications, so that the plaintiff could not recover.

A contract to manufacture an automobile body pursuant to specifications furnished by the vendee is not governed by the rule of substantial performance obtaining in the case of building contracts. It involves the personal taste of the purchaser and strict compliance is required.

APPEAL by the defendant, Charles B. Manville, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 20th day of May, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of May, 1911, as resettled by an order entered on the 8th day of June, 1911, denying the defendant's motion for a new trial made upon the minutes.

Burt D. Whedon, for the appellant.

Malcolm Sundheimer [A. Maurice Levine with him on the brief], for the respondents.

LAUGHLIN, J.:

The plaintiffs have recovered on a contract whereby they agreed to make and deliver to the Milwaukee Auto Engine and Supply Company at Milwaukee, Wis., for the defendant an automobile body for a chassis which said company was making for him. There is some conflict in the evidence with respect to the description of the automobile body which the plaintiffs were to make for the defendant, but a letter written by the plaintiffs to the Milwaukee company under date of March 16, 1909, shows that it was to be made according to a pencil sketch

First Department, February, 1912.

[Vol. 149.]

made by the plaintiffs for the defendant and a blue print drawing of the chassis made by the Milwaukee company, which was delivered to them by the defendant, and in the letter, which was written in reply to a letter from the Milwaukee company asking for a drawing with measurements of the body to be made by the plaintiffs and by which the plaintiffs were expressly informed that there must be an unobstructed space of three inches all over between the bottom floor of the tonneau and the frame of the chassis, and particularly requested that the front end of the body be made according to measurements, as shown on a sketch which they inclosed, so that they could "give the front part the same shape on chassis," the plaintiffs informed the Milwaukee company that they had followed the blue print in making the body, and that, if the blue print was correct, "You will have no trouble with this body when you come to put it on your chassis." The blue print plainly showed that the body of the automobile was to commence on the front line of the front seat and extend back therefrom, and that the extension of the body from that point forward, known as the gunstocks or body extension, was on the chassis and part of it, and also showed an unobstructed space of three inches between the floor of the body or tonneau and the frame of the chassis, and one of the pencil sketches made by the plaintiffs showed the same. The plaintiffs, in accordance with the Milwaukee company's request in said letter, sent two sketches of the body which they were to make. One of these was of the front end, and by its measurements and form indicated to the Milwaukee company that the plaintiffs understood that the body extension or gunstocks was to be on the chassis, but it indicated a departure from the blue print in that it showed that the body of the car ended not at a perpendicular line at the front of the driver's seat but fifteen inches forward of that point. The Milwaukee company, by letter to plaintiffs under date of March 19, 1909, accepted this departure from its blue print and notified plaintiffs that it would construct the body extension to conform with the change and not according to the blue print. Neither of the sketches showed the dimensions of the moldings on the sides of the body. The superintendent and general manager of the Milwaukee company wrote on the sketch of the front end

App. Div.]

First Department, February, 1912.

the dimensions of the molding seven-eighths by three-eighths, to correspond with the molding which was to be on the chassis, and also made a drawing on the sketch of the body extension and wrote on it: "This part is on chassis and made of aluminum," and then returned the sketches to the plaintiffs. It appears that on these sketches being returned to the plaintiffs, the one on which the changes were made was marked, evidently for the guidance of plaintiffs' workmen: "Make this to below sketch."

The evidence introduced on the part of the plaintiffs tended to show that the defendant gave them the order for the body shortly before Christmas in the year 1908, and that on the part of the defendant tended to show that the order was not given until the 3d day of February, 1909. It is fairly to be inferred from the evidence that at the time the plaintiffs received this letter from the Milwaukee company inclosing the sketch, they had commenced to make the automobile body, and it was completed and shipped to Milwaukee on the eighth day of May thereafter. One of the plaintiffs testified that the body shipped by the plaintiffs did not contain a body extension or gunstocks and complied with the blue print and plaintiffs' sketches as amended, but his testimony shows that he did not claim that the three-inch space existed as the floor was placed, and plaintiffs' automobile body builder, who built this body and who was called by the plaintiffs, testified generally that the automobile body shipped by plaintiffs was made according to the blue print and sketches made by the plaintiffs based thereon, containing some alterations which were accepted by the Milwaukee company, as already stated, and some alterations made on the sketches by the Milwaukee company which were apparently accepted by plaintiffs; but on being particularly interrogated with respect to whether it contained a body extension, or gunstocks, he said that he could not tell whether he put the gunstocks on or not. Other testimony, however, given by witnesses called on the part of the plaintiffs tended to show that the three-inch space was not left and that the gunstocks were on the body; and the superintendent and general manager of the Milwaukee company, who received and examined the body shipped by plaintiffs, testified positively that the gunstocks

First Department, February, 1912.

[Vol. 149.]

were on it, and his company so notified the plaintiffs, as did the defendant also. The evidence also shows that the body shipped left a space of from one inch to one inch and three-quarters only between the frame of the chassis and the floor of the body. It appears that the space of three inches between the floor of the body and the frame of the chassis was required to afford room for the transmission and other parts of the machinery of the chassis, which extended two and three-quarters inches above the frame of the chassis.

Immediately on the receipt of the body by the Milwaukee company, the plaintiffs were notified, both by the company and by the defendant that it did not conform to the contract in these and other respects. One of the plaintiffs thereupon went to Milwaukee and interviewed the superintendent and general manager of the Milwaukee company and the defendant; and according to his testimony the superintendent and general manager of the Milwaukee company referred him to the defendant who refused to accompany him and point out the defects. The defendant, however, testified that the defects were stated and this plaintiff admitted that mistakes had been made and offered to take the body back to New York and have the defects remedied, which the defendant declined on the ground of the delay that would be caused thereby, and that the defects could not be remedied and have the car appear as it should and as it would appear if properly constructed originally. The body extension, or gunstocks, on the chassis to be made by the Milwaukee company, and which according to the evidence introduced by the defendant was made and ready for the body, except for some parts which could be attached only when the body was on the chassis, was made of alumium, and the body extension, or gunstocks, on the body delivered by the plaintiffs was of wood, the same as the rest of the body. The plaintiffs claimed and offered evidence tending to show that the body extension, or gunstocks, if on, could have been cut off the body furnished by them, and that the floor of the tonneau was not permanently in place and could have been elevated to afford the requisite space of three inches, by inserting under the sills of the body strips of wood, known as shim rails, which are sometimes used, at a comparatively small

App. Div.] First Department, February, 1912.

expense. The plaintiffs, however, neither attached nor furnished shim rails, and it is not claimed that either the blue print or the sketches showed that shim rails were to be used. It is manifest that if shim rails were used, the car would not present the same appearance as if deeper sills were used to accomplish the same object. It also appears that the molding on the body furnished by the plaintiffs did not conform to the sketch in dimensions, and, therefore, would not match the corresponding molding on the body extension, or gunstocks, which was part of the chassis. We do not deem it necessary to comment on the controversy with respect to providing a door to the tool box under the rear seat for there is a fair conflict in the evidence on that point. Shortly after these interviews with one of the plaintiffs at Milwaukee, defendant shipped the body back to plaintiffs who refused to receive it and it was stored by the railroad company.

If, as the preponderance of the evidence shows, the body shipped by the plaintiffs contained a body extension, or gunstocks, which according to the blue print and sketch it was not to contain, and did not leave a space of three inches between the floor of the tonneau and the frame of the chassis, the defendant was under no obligation to accept it and make the alterations in these respects, or to allow the plaintiffs to make them, for the reasons already stated, and for the further reason that the time within which the plaintiffs were to deliver the body had expired. This contract bears no analogy to building contracts, where the rule of substantial performance obtains, but falls rather within the class of contracts involving the personal taste of the purchaser, in which strict compliance is required.

It follows, therefore, that the judgment and order should be reversed on the ground that the verdict is against the weight of the evidence, and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., MC LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

First Department, February, 1912.[Vol. 149.]

MAXIMILIAN H. FISCHER, Respondent, *v.* NEW YORKER STAATS-ZEITUNG, Appellant.

First Department, February 2, 1912.

Pleading — failure to separately state and number causes of action.

Where, in an action to recover damages for deceit, the plaintiff alleges that he was induced by false and fraudulent representations made by the defendant, the publisher of a newspaper, to enter into a contract to act as its advertising manager, that later he entered into a similar contract and that this contract "was subsequently renewed for each of the years 1908, 1909 and 1910," he attempts to set forth five different causes of action, and will be compelled to separately state and number them as required by section 483 of the Code of Civil Procedure.

APPEAL by the defendant, New Yorker Staats-Zeitung, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of December, 1911, denying the defendant's motion to require the plaintiff to amend his complaint so as to separately state and number the various causes of action therein.

John E. Donnelly [Alfred J. Amend with him on the brief], for the appellant.

Lyle Evans Mahan, for the respondent.

LAUGHLIN, J.:

This is an action to recover damages for deceit. The plaintiff alleges that in the month of March, 1897, he made a contract with the defendant, which was the publisher of a newspaper known as the *New Yorker Staats-Zeitung*, by which he became its special advertising agent to secure advertising matter for the newspaper, and the defendant became obligated to pay him a specified commission on advertising matter solicited by him and on future business with the customers he obtained. He alleges that he was induced to make the contract by false and fraudulent representations made by the defendant with respect to the daily circulation of its newspaper which it knew to be false; that he was authorized to, and did represent, in soliciting advertisements, that the daily circula-

App. Div.] First Department, February, 1912.

tion was as represented to him by the defendant when in fact it was from twenty to thirty thousand copies less; that he did not discover the falsity of the representations until the 1st day of February, 1910, and that he sustained large damages thereby. The plaintiff further alleges that he entered into a similar contract with the defendant in January, 1907, and that this contract "was subsequently renewed for each of the years 1908, 1909 and 1910;" and that plaintiff entered into and continued in defendant's employ under the first contract until the 1st day of January, 1907, and in the years 1907, 1908, 1909 and 1910 until the first day of February of that year under the contracts made for those respective years. He further alleges that like false representations were made to induce him to enter into each of the contracts, and that he was likewise deceived thereby.

Without expressing any opinion as to the sufficiency of the allegations of the complaint to show substantial damages, we are of opinion that the plaintiff has attempted to set forth five different causes of action, and he should, therefore, be compelled to separately state and number them. He pleads five different contracts, and he claims damages on account of the false representations of the defendant in inducing him to make each of the contracts. The defendant was, therefore, entitled to have the causes of action separately stated and numbered as required by the provisions of section 483 of the Code of Civil Procedure.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

LOUIS KANE, an Infant, by PHILIP KANE, His Guardian ad Litem, Appellant, *v.* BERRY B. SIMONS and JACOB MOERSFELDER, Doing Business under the Firm Name and Style of SIMONS AND MOERSFELDER, Respondents.

First Department, February 2, 1912.

Negligence — liability of contractor for injury to boy from fall of building material piled in street — evidence — contributory negligence — liability of sub-contractor.

In an action for personal injuries brought by an infant against the defendants, who were under contract to furnish and set the iron beams in the construction of a building, it appeared that during the progress of the work the sidewalk became impassable, and that the plaintiff being obliged to turn into a carriageway to pass around a pile of the iron beams, was injured by one of the beams which fell upon his foot. There was no evidence of negligence on the part of the boy, and there was nothing to account for the falling of the beam other than that it must have been insecurely piled.

Held, that the dismissal of the complaint at the close of the plaintiff's case was error;

That the fact that the beams were to be used by a sub-contractor did not relieve the defendants from liability, since it was fairly to be inferred from the evidence that the injury was caused by the improper piling of the beams by them.

APPEAL by the plaintiff, Louis Kane, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 30th day of March, 1911, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case on a trial at the New York Trial Term.

John McG. Goodale, for the appellant.

Benjamin Reass, for the respondents.

LAUGHLIN, J.:

The defendants were under contract to furnish and set the iron beams in the construction of a building on the premises 227-231 East Ninety-eighth street, borough of Manhattan, New York. They furnished all of the iron beams pursuant to their contract, but sublet part of the work of setting them.

During the progress of the work the sidewalk became impassable and building material was piled in the carriageway on the northerly side of the street. On the 4th day of March, 1906, the plaintiff, who was then ten years of age, was going easterly on the northerly side of this street and was obliged to turn into the carriageway to pass around a pile of about twenty-five large iron beams, eleven feet or more in length, and while he was walking alongside of the pile one of the beams fell upon his leg and injured it. This action was brought to recover the damages thus sustained. There was no evidence of negligence on the part of the boy, and there was nothing to account for the falling of the beam other than that it must have been insecurely piled. The plaintiff was nonsuited upon the ground that it was not shown that the defendants deposited the beams on the street, or were responsible for the manner in which they were piled.

We are of opinion that the jury would have been warranted on the evidence in finding that the beams were negligently piled, and defendants were responsible therefor. Under their contract it was their duty to furnish the iron, and one of them testified that they did furnish all of the iron used in the construction of this building, and it was further shown that the pile of beams in question were subsequently used in the construction of the building. The fact that the beams were to be used by a sub-contractor does not relieve the defendants from liability, for it is fairly to be inferred from the evidence that the injury was caused by the improper piling of the beams, and not by any use of them by a sub-contractor after being delivered on the street under defendants' contract.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, MILLER and DOWLING, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

CHARLES MCC. CHAPMAN, Respondent, *v.* GEORGE R. READ AND COMPANY, Appellant.

First Department, February 2, 1912.

Motion and order — demand for alternative relief — section 768 of the Code of Civil Procedure construed — judgment on pleadings — complaint stating cause of action — action against real estate broker — discovery — examination of corporation before trial.

A defendant moving for judgment on the pleadings may ask for alternative relief as he deems himself entitled to upon the facts presented in order to save time to the court and expense to litigants.

A motion for judgment on the pleadings should not be granted upon the ground that the complaint fails to state a cause of action where it alleges that the defendant, a real estate broker, having the exclusive right to rent offices leased by the plaintiff, induced him to vacate and promise to pay commissions in reliance upon the defendant's absolute undertaking to obtain a sub-tenant, and upon his statement that he had obtained one, substantial damages being pleaded.

Where the defendant in such action is a corporation and the plaintiff shows that the agreement upon which he bases his action was made with one whom he understood to be the defendant's authorized agent, he is entitled to examine the defendant before trial in order to show the agent's authority. Only one, not two, of the defendant's officers should be examined.

APPEAL by the defendant, George R. Read and Company, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 10th day of November, 1911, affirming an order of the City Court of the city of New York, entered in the office of the clerk of said court on the 9th day of September, 1911, denying the defendant's motion for judgment on the pleadings and to vacate an order for the examination of the defendant before trial by two of its officers.

Louis Lowenstein, for the appellant.

E. Crosby Kindleberger, for the respondent.

LAUGHLIN, J.:

The learned justice of the City Court was of the opinion that it was improper to combine in a single motion an application for judgment on the pleadings or, in the alternative, to vacate the order for the examination of the defendant; but he was also of the opinion that the motion should be denied on the merits. The respondent seeks to sustain the determination on the ground that the motion was unauthorized for the reason that it combined demands for relief of a different nature, depending on different facts and circumstances wholly unrelated. We are of opinion that the practice is authorized by section 768 of the Code of Civil Procedure, as amended by chapter 763 of the Laws of 1911. That section, so far as material to the question now under consideration, is as follows: "The party making a motion may, in the notice thereof, specify one or more kinds of relief in the alternative or otherwise, and the adverse party must, where at least eight days' notice of the motion shall be given, at least one day prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party copies of the affidavits and papers which he expects to read in opposition to the motion; he may, at least three days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice, with or without affidavits or other papers in support thereof, specifying any kind or kinds of relief in the alternative or otherwise to which he claims to be entitled in the action whether the relief so asked for be responsive or not to the relief asked for by the moving party." This legislative enactment should receive a liberal construction to accomplish the purpose intended. It is quite clear that the purpose of the Legislature was to enable not only a moving party, but a party against whom a motion is made, to demand such relief, as, on the facts presented, he deems himself to be entitled to at the time, and thus minimize practice motions and both save time to the courts and expense to litigants.

The appellant contends that its motion for judgment on the pleadings should have been granted upon the ground that the complaint fails to state a cause of action. The theory of the appellant is that the complaint shows that it was employed by

the plaintiff as a real estate broker to sublet an office, of which it held the lease, at 60 Wall street, and that by virtue of such employment a broker does not become liable to obtain a tenant at any and all events, and that as no tenant was obtained and no *facts* showing negligence alleged, although negligence is charged, there is no cause of action. We are of opinion, however, that the plaintiff sufficiently alleges an absolute undertaking on the part of the defendant, which had entire and exclusive charge of renting the offices in the building in question, to obtain a sub-tenant on the terms set forth, for the remainder of plaintiff's term to a tenant which it represented that it had obtained in consideration of the immediate surrender of the office by plaintiff, and an agreement on his part to pay it a commission, and that relying thereon he vacated the offices and surrendered possession. On this theory the complaint clearly states a cause of action, and substantial damages are pleaded.

The appellant also contends that its motion to vacate the order for the examination of two officers of the defendant, which was granted as to one of the officers upon the theory that the examination of one alone would suffice, should have been granted in toto. The defendant is a corporation. The plaintiff shows that the agreement upon which he bases his action was made by him with one W. H. Class, Jr., whom he understood to be the defendant's authorized agent. It is manifest that the examination of an officer of the defendant is essential to plaintiff to show the authority of Class to negotiate the contract. The learned trial justice properly limited the examination to one of the officers of the defendant, which is the practice approved by this court in such case. (*Solar Baking Powder Co. v. Royal Baking Powder Co.*, 128 App. Div. 553.)

It follows that the determination of the Appellate Term should be affirmed, with costs.

INGRAHAM, P. J., MC LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Determination affirmed, with ten dollars costs and disbursements.

In the Matter of the Application of THE CITY OF NEW YORK, Respondent, by the Corporation Counsel, for the Appointment of Commissioners of Estimate and Assessment to Ascertain and Determine the Compensation Which Should Justly Be Made for the Discontinuance and Closing of West One Hundred and Fifty-first Street, from the Easterly Side of Riverside Drive Extension to the United States Bulkhead Line, Hudson River, in the Twelfth Ward, in the Borough of Manhattan, in the City of New York.

JESSIE GILLENDER and FRANCIS HIGGINS, Appellants.

First Department, February 9, 1912.

Eminent domain—closing street in city of New York—damage to abutting owners—evidence—review of determination of commissioners—jurisdiction of commissioners to determine question of title—when street deemed closed—right to damages under Laws of 1895, chapter 1006, section 6.

Where, in a proceeding instituted by the city of New York for the appointment of commissioners to ascertain and determine the damages caused to abutting owners by the closing of a street, the evidence with respect to the value of the parcel and to the damage caused thereto by closing the street is conflicting and no theory is presented by the witnesses called by the city or by the owner upon which it can be determined with any degree of certainty what the value of the property was before the street was discontinued, or what its value is with the street closed, the case is one in which the personal view of the commissioners must be given great weight, and their determination as to the amount of damages should not be disturbed where there is no basis in the evidence for doing so.

In a proceeding instituted to determine the damages caused by closing a street, the principle that a party attempting to acquire title to property by eminent domain cannot claim that it already has the title or easement which it seeks to condemn, does not apply, and the commissioners have jurisdiction to determine the question of title.

A street is deemed legally closed for the purpose of determining who are entitled to an award of damages, not at the time the award for damages is made, but at the time that the essential statutory steps have been taken and the right to damages then accrues.

Ordinarily the right to damages under section 6 of chapter 1006 of the Laws of 1895 depends upon the claimant being an abutting owner on the part of the street discontinued, but the statute is very broad and may be reasonably construed to embrace the claim of a party whose property is left without present access or the prospect of access in the immediate future, although he is not an abutting owner.

CLARKE, J., dissented, in part.

First Department, February, 1912.

[Vol. 149.]

SEPARATE APPEALS by Jessie Gillender and Francis Higgins, claimants, from parts of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of January, 1910, confirming the report of commissioners of estimate and assessment herein, as amended by a supplemental report, with notice of an intention by each appellant to bring up for review various intermediate orders in the proceeding.

Charles De Hart Brower, for the appellant Gillender.

James A. Deering, for the appellant Higgins.

L. Howell La Motte, for the respondent City of New York.

LAUGHLIN, J.:

This is a proceeding instituted by the city of New York for the appointment of commissioners to ascertain and determine the damages caused by the closing of West One Hundred and Fifty-first street, west of the easterly line of Riverside Drive extension, excepting that part of said street which is included within the limits of Twelfth avenue at its intersection with said avenue.

The appellant Gillender is the owner of damage parcel No. 3, which abuts on the northerly side of the discontinued street, west of Twelfth avenue, and she has been awarded \$17,760.71 therefor. She contends that the award is inadequate. The entire parcel is under water, and is unimproved, with the exception that a frame building stands partly thereon and partly on Twelfth avenue, and a narrow dock or pier extends partly along the easterly boundary of the parcel. It does not definitely appear what income she has been deriving therefrom, although it does appear that she received about \$2,000 for the use of this dock and building and a station on parcel No. 4 and the use of the water front one year. The evidence with respect to the value of the parcel and to the damage caused thereto by closing the street is conflicting; and no theory is presented by the witnesses called by the city or by the owner upon which it can be determined with any degree of certainty what the value of the property was before the street was discontinued, or what its

App. Div.] First Department, February, 1912.

value is with the street closed. It may still be utilized as river front property accessible from the river, but the only present access to it has been cut off by discontinuing the street. It still, however, abuts on Twelfth avenue, the title to which has been acquired by the city, but which has not been improved and is under water and at present affords no access to the property.

Under the grant by which the predecessor in title of appellant Gillender acquired title to this land under water from the city the grantee and his heirs and assigns were obligated on three months' notice from the city to construct bulkheads, wharves, streets and avenues in the streets and avenue adjacent thereto and to improve them for said purposes and maintain them at their own expense as required by the city, which obligation they have not yet been called upon to perform, but doubtless her obligation would not now extend to Twelfth avenue as changed in so far as the same was newly acquired. The case is one in which the personal view of the commissioners must be given great weight, and there is no basis presented by the evidence upon which the court would be justified in reversing the determination of the commissioners with respect to the amount of the damages.

The appellant Gillender also claims to be the owner of damage parcel No. 4, but the commissioners have found that title to this parcel is in the city, and have made no award therefor. The learned counsel for the appellant contends that the commissioners were not authorized to determine the ownership of the parcel. This contention is based on the decisions which hold that, where an eminent domain proceeding is instituted to acquire title to property, the party instituting the proceeding cannot claim that it already has the title or easement which it seeks to condemn. (*Matter of City of Yonkers*, 117 N. Y. 564; *City of Geneva v. Henson*, 195 id. 447; *Matter of Village of Olean v. Steyner*, 135 id. 341.) We are of opinion that these authorities are not applicable here, and that the commissioners had jurisdiction to determine the question of title. This proceeding was not instituted to acquire land, but to determine the damages caused by closing the street. The proceeding was instituted by the city pursuant to the provisions of section 4 of

chapter 1006 of the Laws of 1895 for the appointment of commissioners to ascertain and determine the compensation which should justly be made to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises, rights, easements or interests therein, taken, affected, damaged, extinguished or destroyed by the discontinuance or closing of the street. No one was specifically made a party to the proceeding by the city, but, pursuant to the requirements of the statute (§ 6), the commissioners gave notice of their appointment by publishing the same in the *City Record*, and required all parties and persons interested to present their claims, specifying the time and place when they would be afforded a hearing. The appellant Gillender thereafter filed a petition with the commissioners claiming that she owned certain premises, without describing them, which were damaged by the closing and discontinuance of the street, and praying that a just and adequate award be made therefor to her. It may be as claimed that the proceeding was instituted in consequence of the injunction she had obtained, but that is not material, for she could have compelled the city to institute it. She came into the proceeding pursuant to this petition, and thereafter claimed title to both of the parcels now known as damage parcels Nos. 3 and 4, and gave evidence which she contends shows her title and her damages. The city also gave evidence tending to show title in it to parcel No. 4. In the year 1837 one Carman acquired title to the upland extending from the Hudson river between the center line of One Hundred and Fifty-first street and the center line of One Hundred and Fifty-third street easterly to Kingsbridge road. Damage parcel No. 4 lies below and to the west of the original high-water line of the Hudson river and was submerged at this time. It, together with other land under water along this part of the river, was granted to the mayor, aldermen and commonalty of the city of New York in the year 1826 by letters patent. On the 30th day of December, 1852, the city conveyed to Carman the land under water between the center lines of One Hundred and Fifty-first street and One Hundred and Fifty-third street, extending into the river, and the lands thus conveyed were

App. Div.] First Department, February, 1912.

bounded on the east by the original high-water line, and on the west by a line parallel with Twelfth avenue, as shown on a map annexed to the conveyance, and 450 feet westerly therefrom. This deed from the city to Carman contained the following clause: "Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms part or portions of the Twelfth Avenue, One hundred and fifty-first, One hundred and fifty-second and One hundred and fifty-third Streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned."

The map annexed to the conveyance shows Twelfth avenue at right angles to these streets, and that the high-water line ran diagonally across Twelfth avenue between One Hundred and Fifty-first and One Hundred and Fifty-third streets, leaving part of Twelfth avenue between these points on either side of it. Damage parcel No. 4 lies wholly within the lines of Twelfth avenue, as shown on this map, and wholly west of the original high-water line. We are of opinion that the land within the lines of Twelfth avenue and the streets shown on the map were excepted from the grant, and that the title thereto remained in the city. (*Langdon v. Mayor, etc.*, 93 N. Y. 129, 149; *Consolidated Ice Co. v. Mayor*, 53 App. Div. 260; affd., 166 N. Y. 92, 99.) In the year 1869 the commissioners of Central Park, pursuant to the provisions of chapter 697 of the Laws of 1867, changed the location of Twelfth avenue at the point in question, leaving the avenue abandoned as to this parcel No. 4, which was left bounding on the easterly line of Twelfth avenue, as changed and lying between Twelfth avenue as changed and the westerly boundary of the railroad right of way. Section 3 of chapter 697 of the Laws of 1867, under which the location of Twelfth avenue was changed, contained, among other things, a provision as follows: "The abutting owners on such of said streets, avenues and roads as have been opened or ceded, and as shall be abandoned or closed under the provisions of this act, shall become and be seized in fee simple absolute therein to the center line thereof in front of his or their lands respectively."

The appellant Gillender contends that, by virtue of this provision of the statute, her predecessor in title became the owner

in fee simple of this parcel. The right of way of the railroad, which had been acquired at that time, was between this parcel and the lands of her predecessor in title on the east, and other lands of her predecessor in title abutted on the old westerly line of Twelfth avenue, and touched the parcel in question at its extreme northwesterly corner. In other words, this parcel lay diagonally well within the lines of old Twelfth avenue, leaving land upon either side of it between it and the exterior lines of the avenue, except at the northwesterly corner as stated. The part of this land belonging to the appellant's predecessor in title, which touched this parcel in the manner indicated, was, however, acquired by the city and included within the new lines of Twelfth avenue in the proceeding to change the location of Twelfth avenue. We do not deem it necessary to consider the arguments pro and con with respect to whether the appellant's predecessor in title was an abutting owner who could take under the statute a part of the discontinued avenue, for, as has been seen, the fee to this parcel remained in the city, and the mere act of the Legislature could not divest the city of its title. (*Consolidated Ice Co. v. Mayor, supra.*) The appellant Gillender claims in a way, without making a special point of it, that she has title to this parcel by adverse possession. The basis for this claim is evidence that in the year 1868 Carman was in possession of the property and built a small railroad station, known as the Carmansville depot, for the use of the people in that vicinity, and a ramp or roadway, and a bridge to give access from easterly of the railroad through One Hundred and Fifty-first street to the station, and that the station building has remained there and has been used both as a railroad station and after its use as such was discontinued by the railroad for dwelling house purposes ever since, and that the railroad company recognized appellant's father's claim to ownership in the year 1899 by taking a lease of the parcel in question from him and paying him rent therefor, but down to that date the only evidence of actual occupancy or possession was by the railroad company in using this way and station under a claim in its own right, and there was no inclosing or cultivating. Taxes have been paid on the parcel since 1873 by appellant's father, and after his death in 1900 by appellant, but

App. Div.] First Department, February, 1912.

it is not claimed that this is evidence of possession by either of them, and manifestly it is not. This evidence is wholly inadequate to establish title in the appellant by adverse possession. The commissioners, therefore, did not err in declining to make an award to appellant for this parcel.

Appellant Higgins owns the premises known in the record as damage parcels Nos. 1 and 2, which lie between One Hundred and Fifty-second and One Hundred and Fifty-third streets and bound on both streets. Damage parcel No. 1 is bounded on the east by the westerly line of Twelfth avenue, as changed, and damage parcel No. 2 is bounded on the west by the easterly line of Twelfth avenue, as changed. Both parcels are wholly west of the original high-water line, and parcel No. 1 is wholly under water now, while parcel No. 2 is at present upland. Twelfth avenue at this point has not been improved and, as already stated, cannot be used in its present condition, for it is partly under water. West One Hundred and Fifty-second and One Hundred and Fifty-third streets, as well as Twelfth avenue, prior to the times in question, had been acquired by the city in fee for the purposes of public streets, but none of them had been improved or opened or used as public streets in the vicinity in question, and they were and are inaccessible on account of the irregular surface and steep grade rising to the east. Although no formal proceedings to discontinue any parts of West One Hundred and Fifty-second and One Hundred and Fifty-third streets have been taken by the city, they have been effectually cut off between these parcels owned by the appellant Higgins and Broadway by the proceedings for opening and improving Riverside Drive extension. The lands acquired for Riverside Drive extension abutted on the railroad right of way on the east, and the driveway proper at this point crosses One Hundred and Fifty-second and One Hundred and Fifty-third streets on an embankment, the surface of the driveway being about seventy feet above the high-water line, and no opening has been left for either of these streets, and these parcels are left without any possible access to the city through either One Hundred and Fifty-second or One Hundred and Fifty-third streets. The lands acquired for the extension of Riverside drive were acquired and the improvement was made pursuant to the pro-

First Department, February, 1912.

[Vol. 149.]

visions of chapter 665 of the Laws of 1897. Title to such lands vested in the city on the 22d day of September, 1900. The report of the commissioners of estimate and assessment appointed in that proceeding was confirmed on the 17th day of April, 1903. The map under which the necessary lands were acquired was accompanied by a profile made by the engineer of street openings, and it showed the profile of the improvement to be made and that One Hundred and Fifty-second and One Hundred and Fifty-third streets were to be cut off thereby, but that One Hundred and Fifty-first street was to be left open, passing under the driveway through an archway. On the 7th day of July, 1905, the board of estimate and apportionment, acting under the authority conferred by section 442 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1903, chap. 409), adopted a resolution discontinuing One Hundred and Fifty-first street from the easterly side of the Riverside Drive extension to the United States bulkhead line in the Hudson river, and this resolution was approved by the mayor and became effective on the twelfth day of the same month. By the Riverside Drive extension proceedings the city acquired title to a parcel or part of a parcel of land owned by the appellant Higgins abutting on the easterly line of the railroad right of way, but did not take any part of either of the parcels in question in this proceeding. It is contended by counsel for the city that appellant Higgins should have obtained his damages in that proceeding, and that he is deemed to have obtained them therein. No provision of the statute is cited, and we find none indicating a legislative intent that the condemnation commissioners were authorized to award damages for parcels no part of which was acquired by the city, and by the provisions of section 3 of the act the proceedings under it appear to have been confined to the land acquired. No claim is made that the appellant Higgins had a remedy under the provisions of chapter 1006 of the Laws of 1895 to recover damages on account of West One Hundred and Fifty-second and West One Hundred and Fifty-third streets having been thus cut off by the construction of Riverside drive; and if he had, he would doubtless have been confronted with the fact that his lands were still accessible through Twelfth

App. Div.] First Department, February, 1912.

avenue and West One Hundred and Fifty-first street, and, never having been accessible through the other streets, he could not have recovered all of his damages. Counsel for appellant Higgins contends that his client could not have obtained damages in that proceeding for cutting off access to these parcels through One Hundred and Fifty-second and One Hundred and Fifty-third streets, and that if he could it is immaterial, for, since these streets were not accessible, he could not have proved more than nominal damages, and particularly as the plan of improvement showed that One Hundred and Fifty-first street was to be left open which would afford access to these parcels and the only access they had ever had; and he does not seek to recover here any damages caused to these parcels by cutting off or closing One Hundred and Fifty-second or One Hundred and Fifty-third streets. After the railroad was built, and at a time not definitely shown, but between 1853 and 1858, Carman, who was also the predecessor in title of the appellant Higgins and owned considerable land on the water front westerly of the railroad right of way in that vicinity, constructed a roadway from Kingsbridge road down One Hundred and Fifty-first street to Twelfth avenue, passing over the railroad tracks by a bridge and then northerly by a ramp along and within the lines of Twelfth avenue, as changed, to about One Hundred and Fifty-second street, affording access to the railroad station, to which reference has been made, and to the water front at the foot of West One Hundred and Fifty-second street, where Carman had filled in the land under water and constructed a wharf or dock, upon which lumber and coal were landed. The lumber was carted via this roadway to Carman's lumber yard on Tenth avenue, and the coal was carted by the same route to a coalyard at One Hundred and Fifty-first street and Tenth avenue until 1873, when the dock or wharf was leased by the appellant's predecessor in title for coalyard purposes, and was so used for a period of about six years. On the 19th day of April, 1876, the city acquired title to the land within the lines of One Hundred and Fifty-first street, although, as has been seen, it had been laid out on paper and used to a considerable extent for a long period prior to that time. The Riverside Drive extension improvement left One

Hundred and Fifty-eighth street open to the north of these parcels, and One Hundred and Forty-fifth street to the south, but cut off all streets between them excepting One Hundred and Fifty-first street, which was subsequently cut off by the proceedings for the discontinuance of part of West One Hundred and Fifty-first street, and the grade of the streets, so cut off, easterly of the driveway was made to conform therewith, and thus the streets were connected with the driveway; but the westerly side of the driveway across these streets was and is a high wall of masonry. The appellant Higgins sold and conveyed these parcels to the Guaranty Trust Company on the 28th day of December, 1906, and the city contends at the outset that he is not entitled to an award in any event. We are of opinion that this contention is not tenable. Although we held in an action by the appellant Gillender to enjoin the improvement until her easements were acquired, that the city should not be permitted to physically close the street until compensation was made (*Gillender v. City of New York*, 127 App. Div. 612), yet the rule is that, for the purpose of determining who are entitled to the award for damages, the street is deemed legally closed, not at the time the award for damages is made, but at the time that the essential statutory steps have been taken and that the right to damages then accrues. (*Matter of Mayor, etc. [Walton Ave.]*, 131 App. Div. 696; affd., 197 N. Y. 518; *Matter of City of New York [West 151st Street]*, 132 App. Div. 867; *Matter of Richard Street*, 138 id. 821; *Matter of Mayor, etc. [Grote Street]*, 139 id. 69; *Matter of Mayor*, 28 id. 143; *King v. Mayor, etc.*, 102 N. Y. 171.) Moreover the conveyance from appellant Higgins to the Guaranty Trust Company was expressly made subject to any proceedings then pending or thereafter brought relative to "establishing, altering or amending bulkhead and pier lines or laying out, closing, changing, amending, opening or otherwise" Twelfth avenue, One Hundred and Fifty-second and One Hundred and Fifty-third streets, "or any other Streets or Avenues in the Local District of Improvements in which said premises are situated," and the Guaranty Trust Company has made no claim to the award. There can be no doubt on these facts that the premises of the appellant Higgins have been damaged by the discontinuance

App. Div.] First Department, February, 1912.

of this street, and that he sustained substantial damages thereby is rendered probable by the fact that the commissioners originally appointed made him an award of \$35,700 therefor, which was vacated by the court upon the theory that, not being an abutting owner on the part of One Hundred and Fifty-first street discontinued, he was not entitled to any damages, which ruling controlled the action of the commissioners on the last hearing. The question is, therefore, necessarily presented for decision as to whether, by virtue of the provisions of section 6 of chapter 1006 of the Laws of 1895, the commissioners had jurisdiction to award damages to appellant Higgins on these parcels.

The provisions of that section, so far as material to the question, are as follows: "They [the commissioners] * * * shall proceed to make a just and true estimate of the compensation which should justly be made for any loss and damage to the respective owners, lessees, parties and persons respectively entitled in possession, reversion, remainder unto or interested in any land, tenements, hereditaments or premises, easements, rights, or interests taken, affected, damaged, extinguished or destroyed by or in consequence of the discontinuance or closing of any street, avenue, road, highway, alley, lane or thoroughfare, or any part of any street, avenue, road, highway, alley, lane or thoroughfare, described in said petition, * * * and to report thereon to said Supreme Court without unnecessary delay. In the said report * * * in each and every case and cases when the owners and parties interested or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their said report in general terms, the respective sums to be allowed and paid to the owners and proprietors generally of such said lands, tenements, hereditaments and premises for the loss and damage to such owners, proprietors and parties interested in respect to the whole estate and interest of whomsoever may be entitled unto or interested in the same, by and in consequence of such discontinuance or closing."

This court, on an appeal by the appellant Gillender from an
APP. DIV.—VOL. CXLIX. 5

order amending this proceeding so as to discontinue it as to that part of the street westerly of the railroad company's right of way, which would deprive the appellant Gillender of her rights as an abutting owner on the part of the street discontinued, and leave it a lawful street in front of her property, intimated that the result of the amendment might be to deprive her of all claim to damages (*Matter of City of New York [West 151st Street], supra*), but the question was not presented for decision on that appeal. These facts present an unusual situation, for the property of the appellant Higgins is peculiarly situated and at present wholly dependent upon One Hundred and Fifty-first street for access. Ordinarily the right to damages under the statute in question, and under similar statutes, depends upon the claimant being an abutting owner on the part of the street discontinued, but the language of the statute is very broad and may, I think, be reasonably construed to embrace the claim of the appellant Higgins. If the property in question had other means of access, then, not being an abutting owner on the street discontinued, he would have no standing in this proceeding, but this property is left, not with less convenient access, but entirely without present access or the prospect of access in the immediate future, and this has been held in many cases to be an important, if not a controlling, consideration in the construction of analogous statutes, to sustain their constitutionality. (*Fearing v. Irwin*, 55 N. Y. 486; *Coster v. Mayor, etc., of Albany*, 43 id. 399; *Kings County Fire Ins. Co. v. Stevens*, 101 id. 411; *Egerer v. N. Y. C. & H. R. R. Co.*, 130 id. 108, 113; *Reis v. City of New York*, 188 id. 58.) It is contended that the Court of Appeals has decided this question adversely to the claim of the appellant Higgins. The city relies principally upon *Reis v. City of New York (supra)* and *People ex rel. Winthrop v. Delany* (120 App. Div. 801; modified, 192 N. Y. 533) as construing the statute in question. I am of opinion that they are not decisive of the question now before the court. In the case of *People ex rel. Winthrop v. Delany (supra)* a motion for a writ of mandamus had been granted directing the corporation counsel to institute proceedings, pursuant to the provisions of chapter 1006 of the Laws of 1895, to ascertain the damages sustained by the petitioner and

App. Div.] First Department, February, 1912.

by other property owners abutting on the street within the block within which part of it only was discontinued on one side of the street, leaving the street for its entire length still open for travel, but merely contracting its width to the extent of twelve feet through part of the block. The Court of Appeals, without opinion, modified the order granting the application for mandamus by confining the proceeding to ascertaining and determining the petitioner's damages. The discontinuance and closing of this strip was incident to the construction of the new terminal and the changing and enlargement of the Grand Central Station, and the petitioner was the only property owner abutting on the street opposite the discontinued part. Whether the modification by the Court of Appeals was upon the theory that the other parties had not applied to the court to have their damages ascertained and determined, or on the theory that they did not abut on that part of the street discontinued, is a matter of speculation, and I think it more probable that it was intended to leave them at liberty to assert or abandon their rights instead of adjudicating that they had rights which they were not before the court asserting. The *Reis Case* (*supra*) is not controlling for the reason that there the street was discontinued as to one block, and on both sides of the discontinued part of the street the city was the owner of the abutting land. An action for an injunction was brought by the owner of property on both sides of the discontinued street, in the next blocks on either side of the discontinued part, to restrain the erection by the city of a hospital building on the discontinued portion of the street, and, since his property had access by other streets, it was held that he had no easement in this particular block which entitled him to an injunction.

The phraseology of this statute does not indicate that the Legislature merely intended thereby to provide a means of ascertaining and determining damages for which the municipality would be liable without the statute, and there is ample authority for a construction which will extend its provisions to embrace the lands of the appellant, which are wholly cut off from present access. (*Bank of Auburn v. Roberts*, 44 N. Y. 192; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. Cas. 243; *Putnam v. Boston & P. R. R. Co*, 182 Mass. 351;

First Department, February, 1912.

[Vol. 149.]

Mellor v. Philadelphia, 160 Penn. St. 614; *Matter of Melon Street*, 182 id. 397; *Chicago v. Taylor*, 125 U. S. 161; Jones Ease. § 550; Lewis Em. Dom. [3d ed.] § 204.)

It follows that the order should be affirmed, with costs, as to the appellant Gillender, and reversed, with costs, as to the appellant Higgins, and the matter referred back to the commissioners to make an award in accordance with the views herein expressed.

INGRAHAM, P. J., SCOTT and MILLER, JJ., concurred; CLARKE, J., dissented in part.

CLARKE, J.:

I dissent from so much of this opinion as upholds the right of the Higgins property to an award.

Order affirmed, with costs, as to appellant Gillender, and reversed, with costs, as to appellant Higgins, and the matter remitted to commissioners to proceed as directed in opinion. Order to be settled on notice.

In the Matter of the Application of SAMUEL S. KOENIG, Respondent, for a Writ of Mandamus against J. GABRIEL BRITT and Others, Constituting the Board of Elections of the City of New York, Appellants.

First Department, February 23, 1912.

Elections—selection of members of party committees—repetition of names of candidates on ballots where district divided.

Where a party organization acting under the power conferred by the Legislature has selected the Assembly district as its unit of representation and has also fixed the ratio for such representation, based on the votes cast for its candidate for Governor at the preceding State election, the members of the county committee elected by Assembly districts become *ipso facto* members of the judicial, senatorial, congressional, assembly, municipal court, aldermanic, city and borough district committees.

Thus a single appearance of the names of the candidates for the county committee upon the primary ballot is sufficient.

The sole exception to this result is where there are Assembly districts which have been subdivided so that they are entitled to representation in two or more of such committees. In such cases it is the duty of the

App. Div.] First Department, February, 1912.

party organization to establish rules for the proper apportionment of membership between the various Assembly districts and parts of Assembly districts entitled to participation therein, and in the Assembly districts so subdivided the ballot should contain the names of the candidates for membership upon the county committee, and such names should be repeated as often as there are other committeemen to be elected for smaller units than the entire Assembly district, apportioned among the other committees in such numbers as the party rules may determine.

LAUGHLIN, J., dissented.

APPEAL by the defendants, J. Gabriel Britt and others, constituting the board of elections of the city of New York, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of February, 1912, as provides that the ballot by said order directed to be printed shall not make provision for the separate printing and election of members of the judicial district committee, congressional district committee, senatorial district committee, assembly district committee, borough committee, aldermanic district committee or municipal court district committee. The order was made on the return of a writ of mandamus.

Terence Farley, for the appellant.

A. S. Gilbert, for the respondent.

James J. Foley, by permission of court, for the Democratic party of the county of New York.

Herbert R. Limburg, for the Independence League.

DOWLING, J.:

The Legislature in the exercise of a power which is not here questioned has conferred upon party organizations the right to determine the unit of representation from which the members of the county committee shall be selected, as well as the number of members in said committee. Acting under the power thus conferred the Republican organization in New York county has selected the Assembly district as its unit of representation and has also fixed the ratio for such representation, based on the votes cast for its candidate for Governor at the preceding State election. By failing to make any provision adverse to the general

provisions of section 37 of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as added by Laws of 1911, chap. 891) the members of the county committee elected by Assembly districts became *ipso facto* members of the judicial, senatorial, congressional, assembly, municipal court, aldermanic, city and borough district committees, and that such is the effect of the section in question is not disputed; but it is contended that the names of the members of the county committee should be repeated as often upon the ballot as there are separate committees to be filled and appear under the proper committee heading. For this method of election no good argument is advanced. Its sole result would be to incumber needlessly an already cumbersome ballot, for membership in the county committee automatically entitles the person thereupon to membership in all the other committees representing the district as a whole, no matter how numerous they may be. This being so, a single appearance of the names of the candidates for the county committee upon the ballot is sufficient, and when elected their membership in the other committees attaches without further action. The sole exception to this result is in a contingency which actually exists in some districts in New York county and for which in the order appealed from no provision has been made nor has the Legislature specifically provided therefor. This question cannot arise in the case of assembly, senatorial or judicial district committees in none of which is the Assembly district subdivided; but in the case of borough, congressional, municipal court and aldermanic districts there are Assembly districts which have been subdivided so that they are entitled to representation in two or more such committees. In these cases it would seem that neither the county committee nor the party organization can distribute or apportion the delegates between the various committees in which the Assembly district is entitled to representation.

Under the rule laid down in *Matter of Murphy* (126 App. Div. 58) the right of electors to participate in the election of delegates to conventions was limited to election districts in which they are qualified voters. Any contrary rule was there stated to be opposed to the principles of our government and to the letter and spirit of the statute. Under the conditions it would

App. Div.]First Department, February, 1912.

seem, therefore, that the only case in which it is necessary to duplicate the names of the candidates for membership upon the county committee is where the Assembly district is subdivided in the method indicated, and in those cases it is the duty of the party organization to establish rules for the proper apportionment of membership in the borough, congressional, municipal court and aldermanic district committees between the various Assembly districts and parts of Assembly districts entitled to participation therein, and in the Assembly districts so subdivided the ballot will then contain the names of the candidates for membership upon the county committee and the names of such county committeemen repeated as often as there are other committeemen to be elected for smaller units than the entire Assembly district apportioned among the other committees in such numbers as the party rules may determine. Each subdivision of the Assembly district would then be entitled to vote in addition to the county committee for the entire Assembly district only for such other committeemen as reside therein and are named as delegates to that particular congressional or other committee which represents their section of the Assembly district. As to all the other Assembly districts the names of the county committeemen would appear but once. This would give a ballot which it seems to me would as closely as possible carry out the expressed views of the Legislature as carried into effect by the party organization in that it would be simplified by having but one list of names of committeemen for all Assembly districts which were not subdivided for the election of certain officers, and as to districts so subdivided would give a ballot containing the list of county committeemen with only such duplication of part thereof as would be necessary to apportion the representation in the various subdivisions for the purpose of electing other committeemen and would insure the election of such committeemen for the subdivided districts only by the electors entitled to vote therein and to be represented in such committees.

I believe, therefore, that the order appealed from should be modified so as to provide in the cases of congressional, borough, municipal court and aldermanic districts where part of an Assembly district only is included that the names of the mem-

bers of the county committee designated to act in such other committees must be separately printed and designated upon the ballot.

CLARKE, McLAUGHLIN and SCOTT, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

A question has arisen with respect to the validity or construction of section 37 of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as added by Laws of 1911, chap. 891), and the members of the board of elections are equally divided as to whether where the party rules do not provide for the election of members of any committee other than the county committee, the ballots for the primary elections shall contain the names only of candidates for members of the *county committee* of the respective organizations, or whether they shall contain the names of the same candidates in part for same or for *all of the committees* of the organizations enumerated in said section 37. With a view to having the question authoritatively decided, an application was made to the Special Term for a writ of mandamus commanding the board to print the ballots in accordance with the law as construed by the court. The order from which the appeal is taken was evidently based on the theory of construction that, in the county of New York, the members of the county committee of the Republican party shall constitute the members of their various other political committees, for the political subdivision for which they have been elected to represent the electors of their respective parties for the reason that the party has accepted the statutory rule to that effect. The decision about to be made deprives the party of the right to have its other committees composed entirely of members of the county committee, and violates, I think, the express provisions of the statute. By said chapter 891 of the Laws of 1911, section 35 of the Election Law as it then existed was repealed and sections 36 to 40, inclusive, were renumbered sections 16 to 20, inclusive, and inserted in article 2, and new enactments were inserted in article 3 as sections 35, 36, 37, 38, 39 and 40. The new section 35 provides that party committees shall consist of a State committee,

App. Div.] First Department, February, 1912.

of judicial district, congressional district, senatorial district, assembly district, aldermanic district and municipal court district committees, and of county, city and borough committees, together with such sub-committees, or executive or campaign committees, appointed by the State or other committees, as authorized by the Election Law, and such other committees as may be provided for by the rules and regulations of the party. The new section 36 provides that the State committee shall consist of such number "elected from such units of representation, in even numbered years as the respective parties shall provide by rules and regulations adopted at a State convention at which State officers are nominated;" and that each member shall be a resident "of the unit of representation he is elected to represent;" and it contains other provisions with respect to the then present and the future organization of State committees and with respect to State conventions which are not involved in this appeal. The new section 37 provides that the members of all committees enumerated in the new section 35 "shall be elected at primary elections as herein provided for." It then provides that the members of all committees shall be elected at the same primary and specifies the time when it shall be held. Then come the provisions most important on this appeal, which are as follows:

"Members of the county committee shall consist of such number and elected from such units of representation as the rules and regulations of the party may provide, excepting that there shall be at least one member of such committee from each election district in the county.

"Where a judicial district, senatorial district, congressional district, assembly district, aldermanic district, municipal court district, city or borough is coterminous with or less than the limits of but wholly within an entire county, the members of the county committee from such judicial district, senatorial district, congressional district, assembly district, aldermanic district, municipal court district, city or borough, shall constitute the judicial district, senatorial district, congressional district, assembly district, aldermanic district, municipal court district, city or borough committee, unless otherwise provided for by the rules of the party."

Special provision is then made for judicial, congressional and senatorial committees in cases where the district consists of more than one county, except the counties of Fulton and Hamilton, which are deemed to be one county. It appears that the Republican party of the county of New York has adopted the Assembly district as the unit of representation, and it is to be inferred, although it is not clearly stated, that by its rules the members of the county committee are not elected by election districts, but by Assembly districts; and such we are informed by counsel is the case with the other political parties, although that does not appear by the record. The rules of the Republican party, however, do not provide for the election of any members of committees other than the county committee in the county of New York. The judicial district is coterminous with the county of New York and comprises entire Assembly districts. The Senatorial districts also comprise entire Assembly districts. The Thirty-second Assembly district, however, embraces part of the borough of Manhattan and part of the borough of The Bronx, and the Congressional districts do not embrace entire Assembly districts, and the same is true with respect to the Municipal Court districts; and in some instances several aldermanic districts are wholly included in a single Assembly district. Since the rules of the Republican party do not provide that the members of the county committee shall not constitute the members of the other political committees, it is quite plain that, by virtue of the provisions of said section 37, *only* members of the county committee shall be elected by the Republican party, and that the other committees shall be composed of such members; but the Legislature has left it optional with political parties to provide by rules for the election of others than members of the county committee to represent them on one or more of the other committees, and if they should see fit to do that, then no question would arise with respect to the construction of the statute.

The court is in effect asked to nullify these clear provisions of the law, on account of an alleged oversight by the Legislature, with respect to leaving it discretionary with the parties to select as units of representation political subdivisions of the

App. Div.] First Department, February, 1912.

city *larger* than an election district. It is contended that the Legislature is presumed to have known that the parties adopted the Assembly district as the unit of representation, and that the members of the party committees are under the rules of the parties elected, not by election districts, but by Assembly districts. It is, therefore, argued that since, as has been seen, some of the political districts to be represented by committees embrace part, but not the whole, of an Assembly district, there is no method by which it may be determined which committeemen elected on an Assembly district ticket are to represent one or more election districts of that Assembly district on a party committee representing a district which does not embrace the entire Assembly district. If necessary to sustain the constitutionality of the law or to reconcile provisions which are apparently inconsistent it should be held that the party organizations must revise their rules by providing that the members of the county committee shall be elected by election districts, and by apportioning representation on the several committees to the various election districts in the manner provided by law. The respective organizations are now recognized by law, and the members are regarded, for certain purposes, as public officers, and in so far as the Legislature has devolved duties on political organizations, the performance of such duties may be enforced by mandamus (See *People ex rel. Coffey v. Democratic Committee*, 164 N. Y. 335; *Matter of Hines*, 141 App. Div. 569; *People ex rel. McCarren v. Dooling*, 128 id. 1; affd., 193 N. Y. 604; *Matter of Murphy*, 126 App. Div. 58), or summarily under section 56 of the Election Law (as added by Laws of 1911, chap. 891). The question, however, as to whether it will be necessary for the Republican party to amend its rules or for other political parties to do likewise in this regard or in any other respect is not presented for decision, and cannot be authoritatively decided, for no relief is asked against any party organization or committee. The only point presented for decision is whether, in the county of New York, where a party does not otherwise provide by its rules, the members of the county committee become *ex officio* members of the other committees specified in section 37 of the Election Law, which necessitates and permits the election of members of the county committee

First Department, February, 1912.

[Vol. 149.]

only. In such circumstance, I am of opinion that the only names of candidates to be printed on the ballot are the names of candidates for members of the *county committee* and that the court properly so ordered. Vigorous complaint is made against the law upon the ground that the primary ballots will be extremely long. It was stated by counsel for one of the parties that the ballot of his party would in one district be upwards of seventy feet in length. The question as to whether the ballot shall be small or large has been left by the Legislature to the respective party organizations, and depends upon their determination as to whether they desire their party to be represented by large numbers upon the various committees. If a party by its rules sees fit to adopt the Assembly district as the unit of representation and to require the separate election of the members of the various committees instead of letting the members of the county committee act *ex officio* on the other committees and to provide that each Assembly district shall be represented by a large percentage of the voters to be elected as members of the various committees, of course, the ballot will be long in the proportion that such representation is extended. A party, however, is at liberty to provide by its rules that members of the county committee *only* shall be elected, and that *only* one member thereof shall be elected from each election district, and that he shall have a vote and voice on the various committees of which he becomes a member in proportion to the vote of his party cast in his district at the last gubernatorial election. The party vote at the last gubernatorial election was the statutory rule for apportioning representation by delegates in a convention prescribed by section 66 of the Election Law before that section was, by virtue of section 58 of chapter 891 of the Laws of 1911, renumbered and re-enacted in an amended form as section 111, and by the provisions of section 64 of the former Election Law, which was repealed by section 65 of said chapter 891 of the Laws of 1911, that was made the rule of apportionment with respect to members of committees; and doubtless it is still the rule, for section 111 of the present Election Law continues in force the existing units of representation and apportionment of delegates until changed by party rules, and section 36 of the Election Law continues in force the units of representation

and apportionment of members of the State committee until changed as therein provided, but it is not expressly so stated with respect to the other committees, although section 38 of the Election Law continues party rules not *inconsistent* with the Election Law until changed. The Legislature, in repealing this statutory rule with respect to apportionment and declaring that the existing party rules not inconsistent with the Election Law should remain in force until amended or repealed, doubtless intended to leave it discretionary with the parties to adopt a different equitable rule of apportionment; but whatever the rule of apportionment lawfully adopted and existing may be, there should be no serious difficulty in applying it in amending the party rules as may be necessary. I am of the opinion that the party rule adopting the Assembly district as the unit of representation is inconsistent, in part as herein stated with section 37 of the Election Law. I do not agree that the court can amend the statute, but it may declare that a party rule is in part abrogated by the statute.

It is manifest, therefore, that a party may, by refraining from prescribing a different rule on the subject, accept the statutory rule provided in section 37 of the Election Law, and let the members of its county committee represent it on all other committees specified in that section, and if it should then adopt the election district as the unit of representation and provide that only one member of the committee should be elected from each election district, it would be necessary to print on the ballot the name of only one candidate in each column for a member of the county committee. It thus appears that the responsibility for the size of the ballot rests with the respective party organizations. It is not, for the reasons already stated, the province of the court to decide on this appeal in what respect, if any, the party rules of the different parties may require amendment in order that the members of the party may be afforded their constitutional right to intelligently participate in the primary election, and that the election of members of the county committee or other committees may be legal, nor does the record even contain such party rules. Counsel for the respective parties, however, seem to apprehend dire results from the operation of the law, and they have joined in requesting an opin-

First Department, February, 1912.[Vol. 149.]

ion from the court giving a construction to the statute, if it be declared constitutional, which will enable the respective parties to proceed regularly and legally, and in view of the shortness of the time before nominations are required to be made for the primaries by the party committees, and the public interest in the questions, I see no impropriety in expressing an opinion with respect to the construction of the statute and the duty of political committees thereunder which, I think, will render the statute consistent and practical. It may be observed at the outset that no question could arise with respect to the regularity of the election of the members of the county committee or of any other committee required by the rules of the party to be separately elected, on account of the difficulties of which complaint is made, if the respective parties would, by an appropriate rule, adopt the election district as the unit of representation; but if it be deemed desirable by the party organizations to retain the Assembly district as the unit of representation, they or any of them may, in my opinion, do so, provided that the party rule be amended by virtue of the authority to adopt and amend rules conferred upon party committees by section 38 of the Election Law, so as to make special provision for nominations for members of the county committee to represent election districts on a political committee representing a political district not embracing the entire Assembly district in which such election districts are included. If, for instance, one election district only of a particular Assembly district is part of a Congressional district, comprised, with that exception, of other territory, it would seem that a party rule might be devised apportioning membership in the county committee for that Assembly district between that election district and the rest of the Assembly district, of which it forms a part, according to the party rules governing the apportionment of representation to the particular units of representation. If such a party rule were duly adopted, then one or more members of the county committee could be nominated and elected for that election district by the electors thereof, and the remaining members of the county committee to which the Assembly district would be entitled could be nominated and elected on a single ballot by the electors of the remaining election districts.

App. Div.]First Department, February, 1912.

of the Assembly district. I perceive no difficulty in adopting this procedure to any situation arising in the county of New York, disclosed by the record or suggested by counsel. Of course, if party rules require the separate election of members of the different committees, the apportionment of members of the committees other than of the county committee would necessarily be according to the total representation on the particular committee, and not the representation of the Assembly district on the county committee should those representations differ, and the question now presented would not arise. On these suggestions, the appropriate committee of the respective parties should be able to amend the party rules to provide for all of the exceptional situations arising under the law, and to afford the members of their respective parties equal representation, so far as may be, on the respective committees, and equal opportunity to participate in the primaries. On the adoption of appropriate amendments in this regard, the respective party committees will be in a position to file nominations for the primaries, and if other members of the party should then desire to make further nominations by petition, they should, in so doing, follow the party rule with respect to the number of the members of the committee, and the district or districts in which they are to be elected. There is ample time to amend party rules as provided in section 38 of the Election Law, and to comply with the provisions of sections 47, 48 and 49 thereof (as added by Laws of 1911, chap. 891) with respect to designating candidates and filing of designations, and the provisions of section 75, as renumbered and amended by said chapter 891 of the Laws of 1911, if not properly complied with, are mandatory and may still be complied with both by party committees and by the board of elections. If a party organization should fail to adopt appropriate amendments to the rules to carry into effect this legislation, the members of the party would doubtless have a remedy by mandamus, or under section 56 of the Election Law (as added by Laws of 1911, chap. 891), to compel the performance of the duty.

I think it proper to make the further observation that in the exceptional instances cited, a rule would not be valid which would provide for the election of a member or members of a

First Department, February, 1912.

[Vol. 149.]

committee to represent a single election district by the electors of the party in the entire Assembly district; for while that might not be open to objection on the part of the electors represented by other members of committees, it would be open to objection on the part of the electors of that particular election district, whose wishes might be outvoted by electors in other parts of the Assembly district who would be entitled to no vote or voice either in nominations or elections in the particular political district to which such election district only of the Assembly district forms a part, and who, therefore, would have no legal right to participate in the election of members of the committee for a political district in which they are not electors. (See *Matter of Murphy, supra.*) I am of opinion that the court is without authority to require the board of elections to comply with the order as it is to be modified. I, therefore, vote to affirm the order.

Order modified as directed in opinion. Order to be settled on notice.

THE GENERAL SUPPLY AND CONSTRUCTION COMPANY, Respondent, *v.* ROBERT GOELET, Appellant, Impleaded with LENA PLUCKHAM and ANNA FOURCADE, Composing the Firm of PLUCKHAM & COMPANY, and Others, Defendants, and UNIT CONCRETE STEEL FRAME COMPANY and Others, Respondents.

First Department, February 9, 1912.

Contract — building contract construed — action by contractor on quantum meruit — damages — offset by owner — interest — right of owner to cancel contract — waiver of time of performance.

The plaintiff, a construction company, entered into a contract with the defendant to erect a building to be completed on a certain date; in default thereof the plaintiff was to pay the defendant a certain sum as liquidated damages for each day thereafter until the building was completed. The contract contained the usual provisions that should the contractor fail to perform its agreement, the owner should be at liberty, on such failure being certified by the architect, after three days' notice in writing to the contractor, to provide the necessary labor or materials at the expense of the contractor. The contract also provided that the owner should be at liberty to terminate the employment of the con-

App. Div.] First Department, February, 1912.

tractor and to take possession of and complete the work, should the architect certify that the neglect or failure of the contractor constituted sufficient ground for such action. The defendant after an alleged failure of the plaintiff to perform served notice that he would take possession for the purpose of completing the work, but he failed to obtain the architect's certificate, thereby rendering the notice ineffectual. The defendant thereafter forcibly ejected plaintiff and took charge of the work. Plaintiff acquiesced in such action and filed a mechanic's lien for the materials furnished and work performed less the amount received from the defendant and brought an action to recover upon a *quantum meruit*.

Held, that where an owner in effect cancels a contract and the contractor acquiesces therein, the contract no longer governs, and is to be resorted to only to determine how long the contractor was in default in completing the work;

That, in such a case, the owner is entitled to offset against the contractor's claim the general damages which he sustained by the loss of the use of the building between the day when it was to be completed and the day the owner took charge of it in its uncompleted condition;

That the owner is not entitled to recover the liquidated damages since he acquiesced in the continuance of the work by the contractor after the time for completion by demanding through his architect a greater degree of energy and expedition and since he never gave the contractor notice to complete the work within a reasonable time.

The claim of a contractor on *quantum meruit*, being unliquidated and incapable of determination by market values or an arithmetical calculation, interest cannot be allowed.

An owner has a common-law right to cancel a contract after the contractor, without fault on the part of the owner, fails to perform within the time specified for performance or within the time to which by mutual agreement performance has been extended.

Where the time of performance has been waived and the contractor has been permitted to fully perform, the owner cannot interpose the failure of the contractor to perform within the time required as a defense to the action to recover the contract price of the work, but he may counterclaim his damages or sue therefor by an independent action.

APPEAL by the defendant, Robert Goelet, from a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 5th day of October, 1910, upon the report of a referee decreeing the sale of certain premises on the foreclosure of a mechanic's lien filed by the plaintiff, and also from an order entered in said clerk's office on the 1st day of

October, 1910, granting an allowance of \$1,500 to the plaintiff and appointing a referee to sell the premises described in the complaint.

Frederick Hulse, for the appellant.

Benjamin G. Paskus [*Louis S. Ehrich, Jr.*, with him on the brief], for the plaintiff, respondent.

Franklin Nevius [*Arthur S. Van Buskirk* with him on the brief], for the respondent Unit Concrete Steel Frame Company.

LAUGHLIN, J.:

On the 22d day of August, 1906, the plaintiff, a domestic corporation engaged in building construction, and the appellant made a contract in writing by which plaintiff undertook to erect on premises owned by appellant situate at the northeast corner of Sixty-fourth street and Broadway, borough of Manhattan, New York, a six-story reinforced concrete building in accordance with specifications and drawings theretofore prepared by one F. M. Andrews, an architect, under whose direction the work was to be done. The main floor of the building was to consist of stores and the remainder of the building was to be used as a garage. The contract provided that the building was to be completely finished and ready for occupancy on or before the 1st day of July, 1907, and in default thereof the respondent was to pay the appellant as liquidated damages the sum of \$200 for each day thereafter until the building was completed and ready for occupancy. The respondent failed to complete the building within the time specified in the contract, and in fact had not completed the excavation work at one corner of the plot at that time, although the excavation work had been finished and some of the concrete work done on other parts of the plot. The contract contained the usual provision that should the contractor at any time refuse or neglect to supply a sufficient number of skilled workmen, or sufficient materials of proper quality, or fail in any other respect to prosecute the work promptly and diligently or to perform its agreement, the

App. Div.] First Department, February, 1912.

owner should be at liberty, on such neglect, refusal or failure being certified by the architect, after three days' notice in writing to the contractor, to provide the necessary labor or materials at the expense of the contractor; and it was further provided that the owner should be at liberty to terminate the employment of the contractor and to take possession of the work for the purpose of completing it for the account of the contractor as therein provided, should the architect certify that such refusal, neglect or failure on the part of the contractor constituted sufficient ground for such action. On the 2d day of July, 1907, Maynicke & Franke, architects, representing the owner, wrote respondent a letter setting out the status of the work on the day before, which was the day on which the work should have been completed, and demanding that the contractor display greater energy to the extent of working nights, and drawing attention to the fact that the owner would suffer heavy financial loss on account of the delay, and that the contract spoke for itself on that point. The contractor remained in charge of the work, making slow progress, however, without interruption until the 10th day of March, 1908, when Maynicke & Franke in behalf of the owner demanded of Andrews that he issue a certificate authorizing the owner to terminate the contract. This was refused, but on the day following the architect issued a certificate authorizing the owner to supply certain broken stone and gravel with which to prosecute the work and to charge the same to the contractor. The next day, March 12, 1908, the appellant wrote respondent complaining that the work had not been completed within the time specified by the contract and that the contractor had not exercised proper diligence in prosecuting the work, and demanding that the respondent within three days supply a sufficient number of skilled workmen and sufficient material of proper quality to prosecute the work with promptness and diligence, and stating that on its failure so to do the appellant would furnish the labor and materials and terminate the respondent's employment and enter upon the premises and take possession for the purpose of completing the work, and would take possession of the materials, tools and appliances of the contractor thereon for that purpose. The appellant having failed to

First Department, February, 1912.

[Vol. 149.]

obtain the architect's certificate, this notice was ineffectual for the purpose of affording a basis to enable the appellant to take charge of the work under the contract and complete it thereunder for the account of the respondent. On the twenty-first day of March thereafter, without further notice, the appellant forcibly ejected the respondent and took charge of the work, and on the same day the respondent wrote the appellant protesting against his action and claiming that it was not responsible for the delay and stating that it would insist upon its rights under the contract. On the third day of April thereafter appellant wrote respondent another letter in which he stated in substance that pursuant to his previous letter he had proceeded with the reinforced concrete work which respondent had abandoned; that other work had since been done by respondent's sub-contractors who desired their pay, and complaining that respondent had not applied for an installment payment under the contract on March twenty-fifth, as provided in the contract, and had permitted liens to be filed, and giving notice that unless the respondent applied for the installment payment within three days which would enable appellant pursuant to authority contained in letters from the respondent under date of October 14 and 15, 1907, to pay the sub-contractors and unless respondent took action to satisfy the liens and proceeded "in an orderly and diligent manner," appellant should consider that respondent had abandoned the entire work, and would complete the building and charge the expense to the respondent "as provided for in our contract." Respondent replied on the eighth of the same month claiming that appellant had previously ejected it and taken possession of the entire work, and, in effect, that respondent would rest on appellant's prior breach of the contract. There was no further correspondence or negotiations between the parties. The respondent subsequently filed a mechanic's lien for the materials furnished and work performed less the amount received from the appellant, on the theory that it was entitled to a lien to recover for the value of the materials furnished and work done as upon a *quantum meruit* and it thereafter brought this action and has recovered upon that theory.

The learned counsel for the appellant concedes that the con-

App. Div.] First Department, February, 1912.

tract was not lawfully terminated pursuant to its provisions entitling his client to complete the work for the account of the contractor; and it could not be successfully contended that it was terminated under the contract. Counsel for both parties accept as applicable to this case the decision in *Wyckoff v. Taylor* (13 App. Div. 240), wherein it was held that if a building contractor does not complete the work within the time specified, *the owner may then, or at any time thereafter, exclude the contractor and take possession of the work*, on the theory that there is a continuing breach on the part of the contractor who cannot then recover damages for being deprived of completing the work. In that case the contractor after having been ejected from the work during its progress on account of not completing it within the time fixed by the contract, had recovered the contract price of the work as if he had fully performed, and the reversal was on that ground. The court, however, in the opinion discussed the contractor's effort to sustain the recovery on the theory that it was had on a *quantum meruit*, and, without expressing an opinion as to whether he could recover on a *quantum meruit*, held that the evidence in the record would not sustain a recovery on that theory. On the appeal herein, and evidently upon the trial, counsel for both parties considered the *Wyckoff* case as authority for the right of the contractor to recover as on a *quantum meruit* when ejected from the work on account of his failure to perform within the agreed time; but it is not authority for that contention. In the view we take of the case it is unnecessary to consider whether the broad rule stated in the *Wyckoff* case that the owner may at any time after the date for completion eject the contractor as for a continuing breach of the contract, which does not appear to have been essential to an adjudication upon the facts then presented whereby it appeared that the contractor had been ejected about three weeks after the date set for completion had passed, is consistent with the decision made in *Lawson v. Hogan* (93 N.Y. 39), in which it was held that when the owner permits the contractor to remain in charge of the work after the date for completion, completion within the time specified is waived and the contractor has a reasonable time thereafter within which to complete, and

neither party can terminate the contract or put the other in default without giving notice requiring him to perform within a reasonable time, and that in the absence of such notice the contractor could not regard the contract as annulled and recover on a *quantum meruit* on account of delay by the owner, after the time for performance, which delayed the contractor, and other authorities to the same effect. (*Simmons v. Ocean Causeway*, 21 App. Div. 30; *Taylor v. Goelet*, 142 id. 467.) The rule is well settled that the owner has a common-law right to cancel the contract after the contractor, without fault on the part of the owner, fails to perform within the time specified for performance or within the time to which by mutual agreement performance has been extended (*Fraenkel v. Friedmann*, 199 N. Y. 351); but there appears to be no decision of the Court of Appeals deciding whether this is a *continuing* right at all times after the date for performance as stated in the *Wyckoff* case. Assuming that the owner was at liberty to cancel the contract on the ground that the contractor in not having completed was guilty of a continuing breach of the contract, then the ineffectual efforts of the owner to terminate the contract pursuant to the provisions thereof would not affect his right to cancel it; but whether or not the owner had a right to cancel the contract is not very material in the case at bar, for he did in effect cancel it and the contractor has acquiesced in that action, and, as already observed, both parties agree that the contractor is entitled to recover for the value of the work done less any damages to which the appellant may be entitled. The rule is well settled that where the time of performance has been waived and the contractor has been permitted to fully perform, the owner cannot interpose the failure of the contractor to perform within the time required as a defense to the action to recover the contract price of the work, but he may counterclaim his damages or sue therefor by an independent action. (*Deeves & Son v. Manhattan Life Ins. Co.*, 195 N. Y. 324; *Reading Hardware Co. v. City of New York*, 129 App. Div. 292; *Raymore Realty Co. v. Pfotenhauer-Nesbit Co.*, 139 id. 126.) The owner contends that he was entitled to recover the liquidated damages, and the learned counsel for the respondent at one stage of his argument at least accepts that theory, for

App. Div.] First Department, February, 1912.

he contends that the owner was in part responsible for the delay, and that, therefore, the court will not apportion liquidated damages, which is the rule. (*Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479.) The court, however, in *Mosler Safe Co. v. Maiden Lane S. D. Co.* (*supra*) held that where both parties are responsible for delay by which the time fixed for performance has passed and the liquidated damage clause for that reason cannot be enforced, it is the duty of the contractor to complete within a reasonable time after crediting the owner's delay, and on his failure so to do the owner may recover his actual damage. In the case at bar the owner acquiesced in the continuance of the work by the contractor after the time for completion by demanding through his architect a greater degree of energy and expedition, and he never gave the contractor notice to complete the work within a reasonable time nor did he wait a reasonable time after a demand for completion. It is quite immaterial to a decision of the appeal whether the owner's right to damages is to be determined by the contractor depends upon the actual damage which he sustained by the failure of the contractor to perform within the time specified, for he showed that his actual damages were greater than his liquidated damages, and he has not been allowed to recover either. Since, however, there must be a new trial, it is advisable that we express our views on the question of damages. We are of opinion that since the owner in effect canceled the contract, whether rightly or wrongly, and the contractor acquiesced therein, the contract no longer governs, and is to be resorted to only to determine how long plaintiff was in default in completing the work. In that view, the owner's damages are limited to the period between the time when the contractor agreed to perform and the time when the owner prevented further performance. It is not contended on the part of the respondent that the owner was responsible for all of the delay, but it is contended that he was responsible for part of it. We are of opinion that this claim is not supported by the evidence. There is evidence tending to show that architects employed by appellant at the outset, and an architect subsequently employed by him, did not approve certain plans and drawings, which under the contract were to be approved by

the appellant, promptly, and that the appellant failed to promptly indicate the style of columns he desired used in the construction of the building, and it appears by correspondence in the record that frequent complaint was made in behalf of the respondent with respect to these matters; but the statements in the correspondence are not proof of the facts, and there is no evidence that the respondent was at any time ready to proceed with work which it was unable to proceed with on account of any failure of the appellant in these respects or in any other respect.

We are of opinion, therefore, that the appellant was entitled to offset against the respondent's claim the general damages which he sustained by the loss of the use of the building between the day when it was to be completed and the day appellant took charge of it in its uncompleted condition. This view necessarily requires a new trial, but in granting it it is proper to comment on some other claims with respect to the question of damage. The recovery by the respondent for brick and cement delivered on the premises by its sub-contractor who claimed the same cannot be sustained on the evidence in this record, which does not present facts showing that title to the material passed to the respondent. It was, of course, proper for witnesses in forming their opinions with respect to the value of the work done by the respondent to include the actual cost of material and labor and a reasonable profit to the contractor; but the respondent was not entitled to recover for the separate items, and although the evidence in chief was not confined to the reasonable value of the work as a whole, the learned referee undoubtedly followed the proper rule in finally estimating the damages in this regard. The plaintiff's claim on the theory of a *quantum meruit* is necessarily unliquidated and incapable of determination by market values or an arithmetical calculation and it was not entitled to recover interest. (*Delafield v. Village of Westfield*, 41 App. Div. 24; *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11; *Coates v. Village of Nyack*, 127 App. Div. 153; *Fox v. Davidson*, 111 id. 174; *Beckwith v. City of New York*, 121 id. 462; *O'Reilly v. Mahoney*, 123 id. 275.)

It follows, therefore, that the judgment should be reversed

App. Div.]First Department, February, 1912.

and a new trial granted before another referee, with costs to appellant to abide the event.

INGRAHAM, P. J., CLARKE and MILLER, JJ., concurred; SCOTT, J., concurred in result.

Judgment reversed, new trial ordered before another referee, costs to appellant to abide event. Order to be settled on notice.

RACHEL GLATNER, Respondent, *v.* CAROLINE GLATNER,
Appellant.

First Department, February 23, 1912.

Will — real property — life estate — charge for support of daughter — liability of devisee — evidence — equity — remedy at law.

Where a testator devised lands to his wife for life, "subject, however, to my said wife giving a home to my daughter Rachel, so long as my said daughter desires to remain at home," the acceptance of the devise creates a personal liability on the part of the wife either to furnish the daughter a home or to pay to her the reasonable cost of providing a home for herself.

In an action by the daughter against her mother to recover damages for breach of the condition of the devise, evidence of the income derived from the real estate is immaterial.

The daughter's remedy for breach of the condition is an action at law, but where she brings a suit in equity and defendant does not question the form of the action on the trial the court on appeal will not reverse the judgment on that ground.

INGRAHAM, P. J., and LAUGHLIN, J., dissented, with opinions.

APPEAL by the defendant, Caroline Glatner, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 1st day of July, 1911, upon the decision of the court rendered after a trial at the New York Special Term.

George P. Breckenridge, for the appellant.

Charles Putzel [Eliphalet W. Tyler with him on the brief], for the respondent.

SCOTT, J.:

In my opinion the defendant by accepting the devise of the real estate became absolutely bound while said real estate remained in her possession to give a home to plaintiff so long

as said plaintiff desires to remain at home and this irrespective of the question what income was derived from the real estate. The provisions of the will respecting the plaintiff and the son Harry are very different. Respecting plaintiff the obligation imposed is absolute and unqualified. The devise to defendant is made subject "to my said wife giving a home to my daughter Rachel, so long as my said daughter desires to remain at home." As to the son Harry the similar obligation is qualified in two ways. To him the defendant is to provide a home "as best as she can" and only "if he needs it." No such qualification is attached to the condition in favor of plaintiff. I, therefore, think that all the evidence as to the income realized from the property was immaterial. As I regard it, the acceptance of the devise created a personal liability on the part of defendant either to furnish plaintiff a home, or, failing that, to pay the reasonable cost to plaintiff of providing a home for herself by way of damages for the breach of the condition. In this aspect of the case the plaintiff's remedy was an action at law or perhaps successive actions for damages, and I should concur with the presiding justice that this action in equity could not be maintained if defendant had persisted in her objections to such an action. She did not, however, persist. It is true that by her answer she denied plaintiff's allegation that she had no adequate remedy at law, but no point was made of this on the trial, no motion made to dismiss the complaint and no application made for a trial by jury. On the contrary, both parties tried the case as if it was properly brought, and even upon this appeal the defendant makes no question as to the form of the action or as to equity's cognizance thereof. Under these circumstances the parties must be held to have consented to try the case as one in equity, and I see no reason why we should reverse the judgment because it should have been brought on the law side of the court.

The judgment should, therefore, be affirmed, with costs.

CLARKE and MILLER, JJ., concurred; INGRAHAM, P. J., and LAUGHLIN, J., dissented.

INGRAHAM, P. J. (dissenting):

The language of this will disposing of the testator's residuary estate is somewhat peculiar. There is a devise of a life estate

of this real property, and also a bequest of all the residuary personal estate for the life of his wife. She is to have this real and personal estate "to have and to hold during the term of her natural life, and to have the entire income therefrom;" and then follows the clause, "subject, however, to my said wife giving a home to my daughter Rachel, so long as my said daughter desires to remain at home." The situation that existed was, that the principal property in which the wife had a life estate was a tenement house in which he and his wife and daughter had resided. Undoubtedly the testator contemplated that his wife would continue to reside in the apartment that had been before occupied and that it was at this apartment at which the daughter was to be given a home; and this is emphasized by the subsequent clause which provided that if his wife should remarry or go abroad to live the property should be divided between his children. If from any cause the wife was unable to maintain this home, if the income was not sufficient to pay the interest on the incumbrances of the property, or there was no money of the estate from which to maintain the said home in which the daughter was to share, it would seem reasonable that the wife was to be relieved from this obligation. She was to give a home to his daughter Rachel, and was to provide a home as best she could for the testator's son Harry if he needed it. I, therefore, concur with Mr. Justice LAUGHLIN that the obligation to furnish a home, either for Rachel or Harry, depended upon the defendant being able to maintain a home at which the daughter or son could live. This, however, was merely a charge upon the estate devised. There was no trust, and the effect of an acceptance of the estate subject to the charge was to impose a legal obligation upon the defendant to furnish the plaintiff with a home. If the defendant refused to furnish such a home and the circumstances imposed such an obligation upon her, then I think the only remedy that the plaintiff had was an action at law to recover the amount which it would cost her to furnish herself with such a home as was contemplated by the testator. Equity had no jurisdiction to interfere.

I think, therefore, that this judgment in the form in which it was presented was erroneous.

First Department, February, 1912.[Vol. 149.]

LAUGHLIN, J. (dissenting):

The action is based on a provision of the will of Samuel Glatner, who was plaintiff's father and died January 6, 1910. It was duly admitted to probate in the county of New York on the 1st day of February, 1910. The testator after providing for the payment of his debts and funeral expenses gave a legacy of \$500 to his sister-in-law and to her children if she should not be living. He then gave a legacy of \$1,000 to the plaintiff, and in connection therewith he stated in his will as follows: "As she is not married and is dependent on me, I desire to make separate provision for her." He then gave a legacy of \$500 to his son Harry, and stated in the will that he desired to provide separately for this son on account of poor health. He then devised to two other daughters real estate in Nebraska in trust for his grandchildren therein named until one of them attains the age of twenty-one years, when the title was to vest in possession in the grandchildren. The testator's household furnishings and furniture and personal effects were then given to his wife. The 7th clause of the will came next and is as follows:

"All the rest, residue and remainder of my estate, both real and personal, of whatsoever nature and kind and wheresoever situate, including moneys in bank and mortgages, I give, devise and bequeath to my beloved wife Caroline, to have and to hold during the term of her natural life, and to have the entire income therefrom, subject however to my said wife giving a home to my daughter Rachel, so long as my said daughter desires to remain at home, and also to provide a home as best as she can for my son Harry, if he needs it. If my said wife should remarry or go abroad to live, then and in that event the said estate shall be divided between her and my children, one-third part thereof to go to my said wife absolutely, and two-third parts thereof to be divided equally among my children, Harry, Ida, Carrie C., Flora, Rachel, Jennie and Nathan, share and share alike, the child or children of any deceased child to take its or their parent's share."

The testator then devised and bequeathed the reversion or remainder of his residuary estate from and after the death of his wife to his children, share and share alike, with the provi-

App. Div.]First Department, February, 1912.

sion that the children of any deceased child should take their parent's share. The defendant is the widow of the testator and the stepmother of the plaintiff. At the time of the testator's death the plaintiff resided with her father and stepmother in an apartment at No. 162 West One Hundred and Forty-fourth street, and she was furnished a home there by the defendant until December 1, 1910, when the defendant abandoned the apartment on the ground that she could not afford to maintain it and rented a single room for herself, having previously notified the plaintiff that she would be unable longer to provide a home for her. The evidence is conflicting as to whether plaintiff insisted that she was entitled to a home with defendant or left voluntarily. The only property received by the defendant under the devise in the 7th clause of the will was the fee of premises known as Nos. 436-438 East Houston street, borough of Manhattan, New York. The defendant took possession of these premises and collected the rents thereof.

On this evidence the court found that defendant accepted the devise of the real estate on the conditions imposed, and became obligated thereby to provide a home for the plaintiff until such time as the defendant should remarry or go abroad to live, and that having failed and refused to provide a home for the plaintiff, she became obligated to pay the plaintiff the expense of furnishing a home for herself, which the court found to be eight dollars per week, and gave judgment in favor of the plaintiff for the amount due on that theory, and further adjudged that defendant pay the plaintiff the sum of eight dollars per week thereafter in monthly installments until the death of the plaintiff, or until the defendant should remarry or go abroad to live. Proof was made with respect to the rentals received by the defendant from the premises tending to show the net amount; but it was quite indefinite, and no finding was made thereon by the court, and the judgment was not granted on the theory that the net rentals were sufficient to enable defendant to provide a home for plaintiff.

I am of opinion that the construction placed upon the will by the trial court is erroneous, and that the defendant only became obligated to furnish a home for the plaintiff from the income derived from the property which she received under

First Department, February, 1912.

[Vol. 149.]

that clause of the will. It was undoubtedly the duty of the defendant on accepting the devise first to provide from the income thereof a home for the plaintiff. The defendant was to have for her own use and enjoyment the remainder of the income subject to the further obligation to provide a home, if the income would permit of her so doing, for the testator's son Harry, should he need it. This tends to show that the testator realized that the income might be insufficient to provide a suitable home for all of them, and so far as he imposed upon his wife a condition to provide a home for his daughter and son, it was to be from the income of the property which she received under that bequest and devise. It is difficult to discern any theory upon which a court of equity can enforce a compliance with the defendant's obligation, and I am of opinion that the plaintiff's only remedy is an action at law from time to time on proof that there is, or should be by proper management, net income from the property with which the defendant could perform her obligation.

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., concurred.

Judgment affirmed, with costs.

In the Matter of the Application of JOHN J. HOPPER and WILLIAM RANDOLPH HEARST, Respondents, for Relief by a Peremptory Writ of Mandamus or Otherwise against J. GABRIEL BRITT and Others, Constituting the Board of Elections of the City of New York, Appellants.

First Department, February 23, 1912.

Election Law — primary elections — use of party emblem — constitutional law — printing name of candidate more than once on ballot.

As long as full liberty is given for the selection of other emblems and no unfair discrimination is exercised, the mere fact that the party committee which nominally represents the majority of the party membership is

App. Div.] First Department, February, 1912.

given the right to use the party emblem on the primary ballot is not an abuse of the legislative power.

Section 57 of the Election Law and so much of section 58 as provides for the use of a party emblem upon primary ballots are not unconstitutional on that ground.

The purpose of the Legislature was to surround the primary election with every safeguard of the regular election and to give at both the same protection to the voter in the exercise of his franchise and the same freedom in the selection of his candidates.

That part of section 58 of the Election Law which prohibits the name of a candidate at a primary election from appearing on the ballot more than once in connection with the same office or position is unconstitutional.

APPEAL by the defendants, J. Gabriel Britt and others, constituting the board of elections of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of January, 1912, granting the petitioners' motion for a peremptory writ of mandamus.

Terence Farley, for the appellants.

Herbert R. Limburg, for the respondents.

DOWLING, J.:

This appeal is taken from an order directing that a peremptory writ of mandamus issue requiring the board of elections in the city of New York to disregard three certain provisions of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as amd. by Laws of 1911, chap. 891) in preparing the official ballots for the primary election to be held in the month of March next ensuing. These three provisions are as follows: (1) So much of section 37 of said law as enacts: "In the year nineteen hundred and twelve, members of all committees shall be elected at the spring primary, except in the city of New York, where they shall be elected in the fall primary;" (2) all of section 57 of said law, and so much of section 58 as provides for the use of a party emblem upon the primary ballots; (3) so much of section 58 of said law as prohibits the appearance of the name of a candidate more than once on a ballot as a candidate for the same public office or party position.

As to the first direction it is unnecessary for us to pass upon the power of the court to strike from a statute a provision on

First Department, February, 1912.

[Vol. 149.]

the ground that it was inserted through "palpable inadvertence" upon the part of the Legislature, for counsel concede that the law has been so amended that the question is no longer a practical one and discussion of it is, therefore, not required. (See Laws of 1912, chap. 4, amdg. said § 37.)

As to the second direction, we are referred to no statute or decision forbidding the use of an emblem upon the primary ballot. On the contrary, the law in question contains elaborate provisions as to the method of selection of such emblem, and assimilates the same to that used for a regular election. The objection urged is that by granting the party emblem as the committee emblem of the party, an unjust discrimination has been exercised against those who are striving to overturn the control of the party by the dominant faction, as represented by the party committee. We can see no force in this contention. As a matter of practical administration, some one party or faction must have on any ballot such advantage as may come not only from an emblem but from the first column upon the ticket. By the Election Law (§ 58) that position is also given to the candidates designated by the party committee. No good reason is suggested why the followers of a faction which is disputing the supremacy of another then actually in control cannot cast their ballots for the candidates of their choice as freely, fairly and adequately under an emblem of their own selection as under that of the party. Where men take the trouble to vote at a primary they presumably have as intelligent a view of the merits of the issues submitted to them as they have at a general election, and they are as well equipped to make their selection between emblems and candidates. It cannot be seriously urged that the illiterate would all vote for the party emblem at a primary election, or that they would all vote in the first column in the absence of an emblem. Under modern methods full publicity is given to emblem and candidate alike, and no independent movement can fail for lack of an opportunity to present its claims for popular support. In practice the illiterate voter is always the readiest to inform himself of any change in the method of voting. It was to enable him to express his choice that emblems have been provided upon the ballot. (*Matter of Greene*, 9 App. Div. 223;

App. Div.]First Department, February, 1912.

Matter of Wise, 108 id. 52.) As long as full liberty is given for the selection of other emblems and no unfair discrimination is exercised, the mere fact that the party committee which (until displaced) represents the majority of the party membership is given the right to use the party emblem is not an abuse of the legislative power. The learned court at Special Term, finding to the contrary, has stricken from the statute every provision for the use of an emblem upon a primary ballot, and has directed the preparation of a ballot which, devoid of emblems of any sort, would be still more confusing to the voter and would deprive the illiterate voter of the aid which has heretofore been granted him without question. It would render voting at primaries more difficult than at a general election. This is not only plainly in violation of the legislative intent, but creates a new ballot never contemplated by the framers of the act. We believe, therefore, that so much of the order appealed from as directs the board of elections to disregard section 57 and the part of section 58 quoted should be reversed.

As to the third provision, there can be no doubt that it was the purpose of the Legislature to surround the primary with every safeguard of the regular election, to give at both the same protection to the voter in the exercise of his franchise and the same freedom in the selection of his candidates. Illegal practices at either are the subject of appropriate punishment. A primary election is intended to effectuate the will of the enrolled voters of a party as fully as a regular election records the will of the entire electorate. Under these conditions, the prohibition against the name of a candidate appearing more than once in connection with the same office or position falls clearly within the rule laid down in *Matter of Hopper v. Britt* (203 N. Y. 144) and is unconstitutional.

The order appealed from must, therefore, be modified by striking out so much as directs that a peremptory writ of mandamus issue directing the board of elections in preparing official ballots for the primary election to disregard the provisions of section 57 and so much of section 58 as requires the printing of the party and other emblems, and further directing

that they shall omit all emblems upon said ballot, and as so modified it is affirmed, without costs.

CLARKE, McLAUGHLIN, LAUGHLIN and SCOTT, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, without costs. Order to be settled on notice.

THE CITY OF NEW YORK, Appellant, Respondent, *v.* SEELY-TAYLOR COMPANY, Respondent, Appellant, Impleaded with THE EMPIRE STATE SURETY COMPANY, Respondent.

First Department, February 16, 1912.

Municipal corporation — municipal contract — mistake in bid — failure of bidder to execute contract — damages — section 420 of New York charter — liquidated damages — bond accompanying bid — liability of surety same as that of principal — municipal ordinance — judicial notice — right of city to pass ordinances — costs — extra allowance.

Where a statute fixes liquidated damages for the breach of a contract with a municipality, it can recover only the statutory damages for a breach in the absence of fraud or mistake; the amount of actual damages sustained is immaterial.

Thus, where the bidder on a municipal contract in New York city deposited, at the time of making its bid, a certified check in a certain sum, as required by section 420 of the Greater New York charter, which provides, among other things, that if a bidder whose bid has been accepted shall refuse to execute the contract awarded to him, the amount of the deposit required by the section shall be retained by the city as liquidated damages, the city which in its instructions to bidders had required the deposit, can recover for the bidder's failure to execute the contract after it had been awarded to it, only the amount of the deposit, in the absence of proof of fraud on the part of the bidder.

Where a bidder made a mistake in its figures of which it informed the city on the day following the opening of the bids, and at that time requested to be relieved of its bid, the city is limited to a recovery of the damages fixed by the charter.

The purpose of requiring the deposit with the bids was not only to insure good faith on the part of the bidders, but also to indemnify the city against the expense of readvertising and to notify bidders of the amount of damages they would have to pay if they refused to enter into the contract after it had been awarded to them.

It seems, that if the bidder on a municipal contract makes an unintentional mistake in its bid, it can withdraw the same before it is acted

App. Div.] First Department, February, 1912.

upon, and a court of equity can relieve the bidder from executing a contract it never intended to make.

When a principal discharges his full obligation his surety is also discharged.

An agreement by a surety to pay any sum for which his principal is not liable is without consideration.

Thus, where the bidder pursuant to the instructions given by the city delivered with its bid the surety company's bond to indemnify the city against damage by the bidder's failure to do what it was legally obligated to do and whereby the surety agreed that if the contract was awarded to the bidder it would become its surety for the faithful performance of the same, and that if the bidder should refuse to execute the contract, it would pay the city the difference between the sum to which the bidder would be entitled upon the completion of the contract and the sum the city should be obliged to pay to the one to whom the contract should be awarded on a reletting, the city cannot recover damages from the surety beyond those specified in section 420 of the charter.

The bond was only enforceable to the extent to which the principal was liable to the city.

It is immaterial that the check which the bidder had deposited at the time of making his bid had been returned to him by the city.

The power of a city to pass an ordinance is derived from its charter, and an ordinance in so far as it is inconsistent with the charter is void.

The provisions of section 420 of the charter are conclusive as to the amount of damages for a breach of the contract, and the city by ordinance cannot require the bidder to accompany his bid with an undertaking to the effect that if the contract should be awarded to him and he should fail to execute it, he and his surety should be liable to the city in a greater amount than that fixed by said section.

The action by the city to recover of the bidder and the surety the damages fixed by the bond is not so difficult and extraordinary as to justify an extra allowance of costs to the successful defendants.

LAUGHLIN, J., dissented, with opinion.

APPEAL by the plaintiff, The City of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 21st day of June, 1910, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case on a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 23d day of June, 1910, denying the plaintiff's motion to set aside the dismissal of the complaint.

Also, an appeal by the defendant, the Seely-Taylor Company, from an order of the Supreme Court, entered in the office of

First Department, February, 1912.

[Vol. 149.]

the clerk of the county of New York on the 28th day of November, 1910, denying the said defendant's motion for an extra allowance.

Terence Farley, for the plaintiff.

Edward W. Norris, for the defendant Seely-Taylor Company.

Benjamin Reass, for the respondent Empire State Surety Company.

MC LAUGHLIN, J.:

The plaintiff, acting through its commissioner of docks, on or about the 1st of March, 1905, advertised for proposals or estimates for performing labor and furnishing materials required for removing a ferry structure and building in place thereof a new one. The advertisement notified prospective bidders that sealed proposals or estimates would be received by the commissioner of docks until two o'clock P. M., March 13, 1905, and that security would be required in the sum of \$90,000; that each bid or estimate "shall be accompanied by the consent in writing * * * of a guaranty or surety company duly authorized by law to act as surety, and shall contain the matters set forth in the blank forms mentioned below;" and that no bid or estimate would be considered unless, as a condition precedent to the reception or consideration of any proposal it was accompanied by a certified check upon one of the State or National banks of the city of New York, drawn to the order of the comptroller, or money to the amount of five per cent of the amount of the bond required as provided in section 420 of the Greater New York charter. In answer to the advertisement the defendant Seely-Taylor Company submitted a bid, accompanying which was a bond executed in the form required, by the respondent surety company. This bond recited that in consideration of one dollar paid by the city, the receipt of which was acknowledged, the surety company agreed if a contract were awarded to the Seely-Taylor Company it would become bound as its surety for the faithful performance of the same; and "if the said person or persons shall omit or refuse to execute such contract and give the

App. Div.]

First Department, February, 1912.

proper security within five days after written notice that the same is ready for execution, if so awarded, we will pay, without proof of notice or demand, to the said The City of New York, or its successors, any difference between the sum to which such person or persons would be entitled upon the completion of such contract and the sum which The City of New York may be obliged to pay to the person or persons to whom the contract shall be awarded at any subsequent letting."

At the time the bid and bond were submitted, and accompanying the same, the Seely-Taylor Company delivered a certified check drawn on a National bank of the city of New York, payable to the order of the comptroller, for \$4,500. There were several other bidders, and when all of the proposals were opened it was found that the Seely-Taylor Company's bid was the lowest by upwards of \$100,000. On the fourteenth of March, the day following when the bids were opened, the Seely-Taylor Company notified the commissioner of docks and the comptroller of the city, in writing, that it withdrew its bid. On the following day the commissioner of docks acknowledged, in writing, the receipt of the notice, and at the same time notified the Seely-Taylor Company that it had no right to withdraw its bid, and "that if the contract be hereafter awarded to you, the Department will look to you and to your surety to carry out the terms of your bid and to execute the contract accordingly." Some time thereafter the contract was awarded to the Seely-Taylor Company, which it refused to execute, though requested to do so. The city then readvertised for bids, and subsequently let a contract to the lowest bidder on such readvertisement, which was about \$144,000 in excess of the bid made by the Seely-Taylor Company. Some two years thereafter this action was brought to recover this difference from the Seely-Taylor Company and its surety, the city in the meantime having, on demand of the Seely-Taylor Company, returned to it the check for \$4,500.

There was no dispute at the trial between the parties as to the facts above stated, and in addition thereto it appeared from the testimony of the president of the Seely-Taylor Company, which was uncontradicted, that he submitted the bid for his company, and in doing so made an unintentional error of \$93,000;

First Department, February, 1912.

[Vol. 149.]

that this error occurred in transferring figures from a paper upon which he had made his estimate to the formal bid; that on the formal bid he put down the amount as \$10,000, and it should have been \$103,000; that the error was discovered the morning after the bids were opened, when he immediately communicated with the commissioner of docks, and at the same time gave notice that the Seely-Taylor Company withdrew its bid. At the conclusion of the evidence, and after both parties had rested, the trial court dismissed the complaint. The city appeals from the judgment to that effect, and the Seely-Taylor Company appeals from an order denying its motion for an extra allowance of costs.

If it be true, as testified by the president of the Seely-Taylor Company, that it made an unintentional mistake of \$93,000 in its bid, then undoubtedly, before the bid was acted upon, it could be withdrawn and the court in equity could relieve it from executing a contract which it never intended to make. (*Moffett, Hodgkins, etc., Co. v. Rochester*, 178 U. S. 373; *City of New York v. Dowd Lumber Co.*, 140 App. Div. 358.) The conclusion at which I have arrived, however, renders it unnecessary to consider whether such a defense were pleaded, or if so, whether the testimony of the president of the Seely-Taylor Company bearing on that subject should have been submitted to the jury. When the Seely-Taylor Company made its bid it complied with section 420 of the Greater New York charter (Laws of 1901, chap. 466) by delivering a check as therein required. This section of the charter provides, among other things, that "if the said bidder, whose bid has been accepted, shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, or to furnish the required bond, the amount of deposit made by him shall be forfeited to and retained by the said city as liquidated damages for such neglect or refusal and shall be paid into the sinking fund of the city * * *."

If it be assumed that the Seely-Taylor Company's bid were a valid and binding one, notwithstanding the mistake alleged, it could thereafter refuse to enter into a contract, and if it did so the only damage to which it was subjected was that provided in the section of the charter referred to. Its refusal forfeited

App. Div.] First Department, February, 1912.

to the city the amount of the deposit as "liquidated damages." Where a statute provides for liquidated damages, or where there is a stipulation in a contract as to the amount of damages that is to be paid to either party for a breach, then, in the absence of fraud or mistake, the only question which arises is as to the breach. In that case the actual damage is not involved. One cannot recover both. The recovery of one precludes the recovery of the other. (*Cotheal v. Talmage*, 9 N. Y. 551; *Darrow v. Cornell*, 12 App. Div. 604; *Dunn v. Morgen-thau*, 73 id. 147; affd., 175 N. Y. 518; *Shiell v. M'Nitt*, 9 Paige, 101; *Wood v. Niagara Falls Paper Co.*, 121 Fed. Rep. 818; *United States v. Alcorn*, 145 id. 995; *Morrison v. Richardson*, 194 Mass. 370.) To permit a recovery of actual damage, where liquidated damages have been provided for, is to nullify the statute or destroy a contract with reference thereto. The sole purpose of providing for liquidated damages is to prevent, in case of a breach, any question being raised as to the amount that shall be paid or recovered therefor.

The city, when it advertised for bids, informed prospective bidders that they would have to deliver, at the time bids were submitted, a check or money, as provided in section 420 of the charter. The purpose of requiring such deposit to be made was not only to insure good faith on the part of bidders, but to indemnify the city against the expense of readvertising (*Erving v. Mayor, etc.*, 131 N. Y. 133), and also to notify bidders if the contract were awarded to them and they refused to enter into it the precise amount of damage they would have to pay. If this be so, then the only damage to which the Seely-Taylor Company could be subjected for refusing to execute the contract after the same had been awarded to it was the forfeiture of its deposit. The fact that the deposit was returned after the city had requested the Seely-Taylor Company to enter into a contract and it had refused, does not seem to me to be at all pertinent or germane to the question presented on this appeal. The rights of the parties had previously been fixed. It may be assumed there was no authority on the part of the city officials to return the deposit, or the Seely-Taylor Company to receive it, and that the city has a cause of action therefor against one, or both, but this action is not brought to recover that

First Department, February, 1912.

{Vol. 149.

sum. It is not even suggested in the complaint, the proof or brief of counsel that this sum can be recovered in this action, or the action can be treated as one to recover that damage. It cannot be here recovered unless pleadings, proof, the theory upon which the action was tried, and the views of counsel are to be entirely disregarded.

If the foregoing views be correct, then it follows that the complaint was properly dismissed as to the Seely-Taylor Company and the sole question remaining is whether it was properly dismissed as to the other defendant, the Empire State Surety Company. The condition of its bond, in terms, made it liable, the Seely-Taylor Company having been awarded the contract and refused to execute it, for the damages here sought to be recovered. The Seely-Taylor Company was the principal and the surety company its surety. The bond was to indemnify the city against damage by the failure of the principal to do what it was legally obligated to. There was a legal obligation resting upon the Seely-Taylor Company, its bid having been accepted, to execute a contract. It refused to do this and by reason of such refusal became liable to pay whatever damage the city sustained. This damage had been agreed upon in advance, which sum was paid by forfeiting to the city the amount of the deposit. The principal having paid all the damage sustained by the city, the surety was thereby discharged. When a principal discharges his full obligation, then his surety is also discharged. The agreement on the part of the surety to pay any sum for which the principal was not liable was without consideration. That was not the purpose of the bond and to this extent it cannot be enforced. It is suggested that the bond was in the nature of a separate undertaking on the part of the surety and was authorized by section 349 of the revised ordinances of the city. This ordinance was not offered in evidence and the court cannot take judicial notice of it. (*Porter v. Waring*, 69 N. Y. 250; *People ex rel. Cross Co. v. Ahearn*, 124 App. Div. 840; *City of New York v. Knickerbocker Trust Co.*, 104 id. 223.) But if considered as in evidence, it would not aid the city because so far as it relates to the payment of damages for the refusal of the principal to enter into a contract awarded, it is inconsistent with section 420 of the

App. Div.] First Department, February, 1912.

charter. The power on the part of the city to pass an ordinance is derived from its charter and an ordinance, in so far as inconsistent with the charter, is void. (*Phelps v. Mayor, etc.*, 112 N. Y. 216; *City of Rochester v. West*, 29 App. Div. 125; affd., 164 N. Y. 510; *Broadway, etc., R. R. Co. v. Mayor, etc.*, 49 Hun, 126; *Cowen v. Village of West Troy*, 43 Barb. 48; Dillon Mun. Corp. [5th ed.] 587.) Section 420 of the charter provides what damages shall be paid by a bidder whose bid has been accepted, for refusing to enter into a contract. Any attempt on the part of the city by an ordinance to impose any greater damage is ineffectual and cannot be enforced.

My conclusion, therefore, is that the complaint was also properly dismissed as to the surety company.

As to the appeal by the Seely-Taylor Company, I do not think the court erred in denying its motion for an extra allowance of costs. The trial was not a long one, nor were there, in my view, difficult questions of law involved. The case was not difficult and extraordinary within the meaning of section 3253 of the Code of Civil Procedure for which an extra allowance of costs may be awarded.

The judgment and order appealed from, therefore, should be affirmed, without costs to either party.

CLARKE and SCOTT, JJ., concurred; LAUGHLIN, J., dissented.

INGRAHAM, P. J. (concurring):

Under the form of the bid submitted by the Seely-Taylor Company I think that company became obligated to execute the contract which was annexed to and a part of the bid if the contract was awarded to it, and was not authorized to withdraw a bid after it was submitted. The defendant was, therefore, liable for the damages sustained by the plaintiff in consequence of its failure of refusal to execute the contract. Under section 420 of the New York charter (Laws of 1901, chap. 466), however, the extent of this liability is fixed by the provision which required that the deposit made by the bidder with the comptroller at the time of making his bid should be the liquidated damages to which the plaintiff would be entitled if the accepted bidder refused to execute the contract. The plaintiff is, therefore, limited to the amount of such deposit

First Department, February, 1912.

[Vol. 149.]

as the damages to which it would be entitled for a breach of the obligation to execute the contract by the bidder. It appears by the record that that deposit has been returned to the bidder, but the effect of such return is not presented on this appeal. The only doubt I have is as to whether that amount could be recovered in this action, but I am inclined to think the court was right in view of the pleadings in dismissing the complaint. I have no doubt but that the liability of the defendant the Empire State Surety Company was limited to the obligation of the bidder and that, therefore, the complaint was also properly dismissed as to it.

For these reasons I concur in the conclusion of Mr. Justice McLAUGHLIN that the judgment should be affirmed.

LAUGHLIN, J. (dissenting):

The facts are sufficiently stated in the opinion of Mr. Justice McLAUGHLIN, I think, with the exception that the proposed contract and specifications upon which proposals were invited contained express references to certain sections of the ordinances of the city as authority for requiring certain things, and, among others, that the proposals should be accompanied by an undertaking in the form thereby required, which is the form of undertaking executed by the respondent surety company. It would have been more satisfactory had the city proved the ordinance, but I think that we may fairly assume that the undertaking was required thereby. I concur in the view that the surety company is not liable if the bidder is not; but I am of opinion that although the bidder did not execute the undertaking it became bound to the same extent as the surety, for its proposal could be regular and received only in the event that it submitted it in writing with such an undertaking. The liability of the principal, therefore, is to be read into the undertaking. I am of opinion that the provisions of section 420 of the charter are not exclusive, and that it was competent for the municipality to require, as it evidently has required by ordinance, that the bidder shall accompany his proposal by an undertaking to the effect that if the contract shall be awarded to him, and he fails to execute it, he and his surety shall be liable to the city for the difference between his proposal

App. Div.]

First Department, February, 1912.

and the proposal upon which the city is obliged to award the contract at a subsequent letting. This is a provision for additional protection to the city over and above the protection which section 420 of the charter was designed to give. Doubtless the liquidated damages over and above the expense of readvertising would have to be applied in reduction of the liability of the bidder and his surety. We are not now concerned with the return of the check deposited with the bid for manifestly the action of the comptroller and of the sinking fund commissioners in returning the check does not constitute an adjudication that the defendants are not liable on the undertaking. The Legislature, I think, did not intend that the forfeiture of the check would in all cases make the city whole for the damages it sustained. Such a construction would leave it open to bidders by collusion to withdraw all of their bids, one after another, and to submit higher proposals on a reletting of the work, and would open the door to collusion and fraud between them and public officials. A person submitting a proposal for public work under the Greater New York charter is of course not entitled to have the work awarded to him even though he be the lowest bidder, and he cannot recover damages against the city for the wrongful letting of the work to a higher bidder without readvertising (*Molloy v. City of New Rochelle*, 198 N. Y. 402); but I agree with the views expressed by Judge VANN in *Molloy v. City of New Rochelle* (*supra*), that if the bidder should proceed with diligence he would be entitled, in the event that the contract is awarded without reletting, to a mandamus commanding that it be let to him. The proposal, however, submitted pursuant to the provisions of the charter, and the ordinance and plans and specifications and proposed contract, obligated the bidder to enter into a formal contract if the contract should be awarded to him, and he cannot, in my opinion, withdraw his proposal at will, or even for a mistake made by himself in calculating the items upon which he based it. When, therefore, the contract was awarded to the respondent Seely-Taylor Company, and it refused to execute the same, both it and the surety company became liable pursuant to the provisions of the undertaking. Thereby the record discloses a legal contract obligation by which the bidder and its surety are

held. It is, however, competent for a court of equity to relieve it from its obligations and to cancel its and the surety company's liability, or to enjoin the municipality from enforcing the liability. This, however, is an action at law to recover on the legal liability of the contractor and the surety company, and, if they wish to avoid their apparent legal liability, they must plead by way of counterclaim the facts entitling them to a cancellation of the proposal and the undertaking, or to an injunction against the enforcement of the undertaking. (*Born v. Schrenkeisen*, 110 N. Y. 55; *Moffett, Hodgkins, etc., Co. v. Rochester*, 178 U. S. 373; *City of New York v. Dowd Lumber Co.*, 135 App. Div. 244.) The equitable counterclaim should be first tried at Special Term. Of course this regular method might be waived by consent, and the defendants might in that event be relieved by proof of the facts. (*Born v. Schrenkeisen, supra*; *City of New York v. Dowd Lumber Co.*, 140 App. Div. 358.) The court, however, in the case at bar was not at liberty to dismiss the complaint, for a question of fact was presented as to whether or not there was an error in the proposal which resulted from an excusable mistake on the part of the bidder, and the testimony of its president was not conclusive on that point, and even if the trial of that issue by the court was waived, it presented a question to be determined by the jury.

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

Judgment and orders affirmed, without costs.

**ABRAHAM KORNBLUTH, Respondent, *v.* EDWARD A. ISAACS
and Others, Appellants.**

First Department, February 23, 1912.

**Discovery — examination of party before trial — fraudulent conspiracy
of defendants — sufficiency of moving papers.**

The right to examine an adverse party before trial is a substantial one which should not be denied if made in good faith and for the purpose of obtaining testimony to be used on the trial. It should only be denied if it is sought for some ulterior purpose.

App. Div.] First Department, February, 1912.

Where from the nature of an action it seems probable that plaintiff will have to produce the defendants as witnesses to prove his cause of action he will generally be allowed to examine them before trial.

Where the complaint alleges that defendants fraudulently conspired to place a fictitious lease upon premises owned by one of them for the purpose of inducing the plaintiff to purchase the same for more than their real value and the answer is a general denial, plaintiff should be allowed to examine defendants before trial as to the alleged conspiracy since defendants are the only persons who have knowledge of the existence of the alleged fraudulent acts and who can testify to them.

Where plaintiff's moving papers state not only that he requires the testimony sought to prepare for trial, but also that he intends to use it on the trial, and the papers show that he expects to prove certain material facts in issue by the examination, they are sufficient in this respect.

The moving affidavits on a motion to examine an adverse party before trial should allege facts, not conclusions or allegations upon information not disclosed.

But in an action involving fraudulent concealment plaintiff will not be required to allege specifically as facts matters which under the theory of the complaint are solely within the knowledge of defendants.

APPEAL by the defendants, Edward A. Isaacs and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of January, 1912, denying the defendants' motion to vacate an order for their examination before trial.

Benjamin N. Cardozo, for the appellants.

Arthur Garfield Hays, for the respondent.

Order affirmed, with ten dollars costs and disbursements, on opinion of LEHMAN, J., at Special Term.

The following is the opinion delivered at Special Term:

LEHMAN, J.:

The plaintiff has brought an action against the defendants, alleging that they have fraudulently conspired to place a fictitious lease upon premises owned by one of the defendants for the purpose of inducing the plaintiff to purchase these premises for a sum of money above their real value. The answer of the defendants is practically a general denial. The plaintiff has obtained an order for the examination of the defendants upon the issues raised by the denial, and the defendants have

First Department, February, 1912.

[Vol. 149.]

moved to vacate this order on the ground that the order for the examination is not sought in good faith. There is no doubt but that the rules in regard to the moving affidavits to obtain an order for the examination of adverse parties have been in this jurisdiction considerably relaxed in recent years. The decisions of the appellate courts announcing the relaxation of the rules in this respect have been followed by a flood of applications for examinations before trial not made in good faith and for the purpose of obtaining testimony to be used at the trial, but for the purpose either of cross-examining the adverse parties before the trial or of obtaining the adverse parties' testimony in advance in order to be able to meet it at the trial. The appellate courts have in ordering the vacation of these orders been obliged to state that there were still limitations upon the proper exercise of the court's discretion to order such examinations. A review of these decisions, however, discloses that the courts still regard the right of examination of an adverse party before trial as a substantial right which should not be denied if it is made in good faith and for the purpose of obtaining testimony, though it should be denied if the order is sought for some ulterior purpose. In this case the defendants urge that it should be denied because of the improbability of the plaintiff's expecting to obtain testimony for use at the trial after the defendants have denied the fraud and conspiracy. I do not think that this contention is sound. This examination could be granted only after issue is joined, and the joining of issue in itself shows a denial by the adverse party. The facts which the plaintiff seeks to elicit, if they exist at all, are within the knowledge of the defendants. The fraudulent acts, if performed, were performed among themselves, and they are apparently the sole persons who have knowledge of their existence and can testify to them. While in many instances the fact that the adverse party denied the acts must be considered upon the probability of the good faith of the moving party in seeking the examination, yet where from the nature of the action it seems probable that the plaintiff will be bound to produce these adverse parties as witnesses to prove his cause of action, there is no reason why the examination should not be ordered. The defendants rely for authority for their contention upon

App. Div.] First Department, February, 1912.

various cases, but I do not find that any of these cases sustain their contention. In the case of *Wood v. Hoffman Co.* (121 App. Div. 636) the defendant sought to obtain from the plaintiff in a negligence action his version of the accident. The plaintiff was bound to establish the negligence as part of his affirmative case, and there is no doubt that under such circumstances "it is quite improbable that a defendant in a negligence action could in good faith say that he intended to use the deposition of the plaintiff upon the trial of the action." The evident purpose of the application in that case was to secure a cross-examination before trial. In the case of *Wessel v. Schwarzler, No. 1* (144 App. Div. 587) the plaintiff sought an examination of the defendant in an action brought for the seduction of plaintiff's daughter. The defendant denied the seduction. The matter to be proven was a single act, and that act was as much within the knowledge of plaintiff's daughter as of the defendant. In this case, however, nobody except the defendants participated in the alleged fraudulent acts, and the proof of these acts, as shown by the moving affidavits, will depend not solely upon the direct testimony of the defendants as to whether or not they acted fraudulently, but upon the testimony as to surrounding circumstances from which the fraud might be inferred. In *Segschneider v. Waring Hat Mfg. Co.* (134 App. Div. 217) the defendant sought an examination of the plaintiffs as to a contract to which both were parties and which the defendant had by its answer stated was not a contract as alleged in the complaint. The moving papers clearly showed that the examination was not for the purpose of establishing the defendant's case, but to find out what the plaintiffs' testimony would be and to prepare to meet it. In *Diefendorf v. Fenn* (125 App. Div. 651) the order for the examination was sought before issue was joined in and for the purpose of preparing for trial, and the court merely held that no such ground for examination exists. It is true that in the case before me the moving papers also allege that the plaintiff requires this testimony to prepare for trial, but this is not only coupled with the statement that he intends to use it at the trial, but the papers affirmatively show that the plaintiff expects to prove certain material facts in issue by the

examination. In *Reusens v. Arkenburgh* (136 App. Div. 653) the examination was sought upon the issues which the adverse party was bound to establish, and the examination was obviously for the purpose of forcing him to disclose his testimony before trial. Since the argument of this motion the Appellate Division of this department has reversed an order for examination before trial under circumstances that seem to me more like those of the present application than any of the other cases. (*Vogel Co. v. Backer Const. Co.*, 148 App. Div. 639.) In that case as in this the main objection to the order was that the party seeking the examination stated that he expected to prove by the examination facts different from the statement of facts contained in the defendant's verified answer. The case, however, differs from the present case in that the examination was sought for the purpose of "avoiding and properly defending" the two counterclaims set out by the adverse party. The examination was evidently asked for the purpose of finding out in advance what evidence the adverse party intended to produce to sustain those counterclaims and to give the moving party the opportunity to cross-examine before trial and without the usual limitation imposed on cross-examination. (See, also, *Weeks v. Whitney*, 146 App. Div. 621.) In the case before me, however, the examination is sought upon issues which the moving party must establish, and while it is not probable that he can obtain any testimony in direct contradiction of the facts sworn to by the defendants, it may well be that he will be able to elicit testimony as to surrounding circumstances from which the inference of fraud which the plaintiff is bound to establish may be drawn. It seems to me that these cases have left untouched the salutary rule that where the court can see that a party actually desires the testimony of an adverse party upon the issues which he must prove he should be allowed to obtain an examination before trial and should not be placed in the position of being obliged to await the trial to find out whether the adverse party will give the testimony which he desires to elicit. I have not attempted to distinguish a recent Special Term decision of a justice of another department which has been cited by the defendants because the opinion does not state the facts upon which the decision is based.

App. Div.]

First Department, February, 1912.

It relies for authority upon the cases I have discussed above, and I have no reason to believe that it extends the principles of those cases. The defendants have not raised the specific objection that the moving affidavits upon which the order was obtained are made partly upon information and belief, but, inasmuch as they challenge the good faith of the application, I am bound to consider this point. The moving papers should allege facts and not conclusions, and allegations upon information not disclosed are not facts. Nevertheless, in an action which involves fraudulent concealment it would not be possible to require the plaintiff to allege specifically and as a fact the very matters which under the theory of the complaint are solely within the knowledge of the defendants, and I think that sufficient facts have been alleged to support the order for examination.

Motion should be denied, with ten dollars costs.

In the Matter of the Judicial Settlement of the Account of Proceedings of GEORGE MACCULLOCH MILLER, as Executor, etc., of LOUISE H. LECLERE, Deceased.

LA FACULTÉ DE THÉOLOGIE PROTESTANTE DE MONTAUBAN and L'UNION NATIONALE DES EGLISES REFORMÉES EVANGELIQUES DE FRANCE, Appellants; THE SOCIÉTÉ POUR L'ENCOURAGEMENT DE L'INSTRUCTION PRIMAIRE PARMI LES PROTESTANTS DE FRANCE, Respondent.

First Department, February 16, 1912.

Conflict of laws — validity of bequest made by resident of this State — bequest for charitable use, when valid — bequest in trust to French theological school — effect of French statute disestablishing institution — when trust does not fail — inability of trustee to take — trust administered by Supreme Court.

The validity of a bequest of personal property located here made by a resident of this State is to be determined by the laws of this State.

A bequest of personal property in trust to be used for free scholarships in an incorporated theological school situated in the Republic of France is a legal bequest for charitable use under the law of this State.

First Department, February, 1912.

[Vol. 149.]

Such bequest does not fail because of the fact that prior to the death of the testatrix the so-called Separation Law of France was passed whereby the beneficiary was disestablished and ceased to be a government institution, if in fact it continued to exist under said act as an independent school of theology maintaining scholarship students.

Neither does the trust fail because of the fact that the foreign institution may not be entitled to take legal title as trustee under the French law, for equity will not allow a trust to fail for want of a trustee.

Under the circumstances the trust fund will be administered by the Supreme Court of this State and the proceeds transmitted to the foreign beneficiary.

LAUGHLIN, J., dissented, with opinion.

APPEAL by La Faculté Théologie Protestante de Montauban and another, contestants, from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 25th day of July, 1910.

John S. Wise, Jr., of counsel [*J. S. & H. A. Wise*, attorneys], for the appellants.

Frederic R. Coudert of counsel [*Coudert Brothers*, attorneys], for the respondent.

CLARKE, J.:

Appeal from the decree of the surrogate in a proceeding for an accounting, holding that a legacy had lapsed and had gone into the residuary estate.

Louise Leclerc executed her last will and testament on July 9, 1886. She died in the city of New York, of which she was a resident, on February 24, 1907, and her will was admitted to probate June 10, 1907. She appears to have left no relatives.

The question here grows out of the following clause of the will: "I give and bequeath to the Faculté de Théologie Protestante de Montauban, in France, One Hundred Thousand francs, of the currency of France, to be held in trust, to invest and keep the same invested and drawing interest and to apply the interest and income therefrom yearly and every year, to as many free scholarships, under the control of said Faculté as said yearly interest will pay for or allow. Such scholarships to be granted, *first*, to the sons of poor clergymen in France intending to become ministers of the gospel, as may desire the same, and *secondly*, in the absence of such to any poor young

App. Div.] First Department, February, 1912.

men wishing to become ministers of the gospel or missionaries. It is my desire that this fund or endowment may bear my mother's name, and be known and designated as the 'Fonds Guinaud' and to her memory I institute and dedicate the same."

She directed her executors to divide all the rest and residue of her property and estate into two shares, one of which she gave to the French Evangelical Church in the city of New York, and the remaining half to the Societe Protestante pour l'Encouragement de l'Instruction primaire en France, to be used forever by such society to increase the salaries of deserving teachers in the discretion of said society.

On December 9, 1905, fourteen months prior to the death of testatrix, the Separation Law was passed by the French Legislature and promulgated on December eleventh by the President of the republic. The said law provides: "Article First. The Republic assures the liberty of conscience. She guarantees the free exercise of religious bodies under the sole restrictions hereinafter provided in the interest of public policy. 2. The Republic does not recognize nor pay, nor subvention any cult. Consequently, on and after the first of January, following the promulgation of the present law, shall be suppressed from the State budget and from the budgets of the departments and communes all provisions relating to the exercise of cults.

* * * Public establishments of worship are suppressed under reserve of the provisions contained in Article 3. * * *

3. The establishments, the suppression of which is ordered by Article 2, shall continue to function provisionally in conformity with the provisions which now govern them until the attribution of their assets to such associations as are provided for by Title 4, and at the latest until the expiration of the delay hereinafter indicated. * * *

4. Within one year from the promulgation of the present law, the personal and real property of the 'meaces' 'fabriques,' 'conseil presbyeraux' 'consistories' and other public cultural establishments shall be with all their liens and encumbrances and with their special affectation transferred by the legal representatives of said establishments to the associations which, in conforming with the general organization rules of the cult the exercise of which they propose to assume, shall have been legally formed according to

First Department, February, 1912.

[Vol. 149.]

the provisions of Article 19, in regard to the exercise of said cult in the former circumscription of said establishment.

* * * 18. Associations formed for the purpose of providing for the expenses, maintenance and public exercise of a religion must be constituted in conformity with Article 5 and the following Articles of Title 1 of the law of July 1, 1901. Furthermore, they shall be subject to the provisions of the present law. 19. * * * The associations shall be able to receive, besides the subscriptions provided for by Article 6 of the Act of July 1, 1901, the proceeds from the collections for the expenses of the cult, and to receive remuneration for the ceremonies and religious services even by foundation; for the hiring of pews and seats; for the supply of things destined to funeral services in religious buildings and the decoration of such buildings. They shall be able to pay, without giving rise to a fiscal tax, the surplus of their receipts to other associations constituted with the same object. They shall not be able to receive, under whatever form it may be, subventions from the state, the departments and communes. * * * 20. Such associations may, within the forms provided for by Article 7 of the decree of August 16, 1901, constitute unions having a central administration and management. Such unions shall be governed by Article 18 and by the last five paragraphs of Article 19 of the present law.

* * * 22. Associations and unions may employ their available resources for the creation of a general reserve fund sufficient to assure the expenses and maintenance of religion, but said fund cannot in any case receive any other destination; the amount of such general reserve can never receive a sum which shall be equal, for the unions and associations having more than 5,000 francs of income, to three times and, for other associations, to six times the average sum usually disbursed by each of them for the expenses of worship during the last preceding five years of its existence. Besides this general reserve fund, which must be invested in nominative securities, they may create a special reserve fund which must be deposited in money or in nominative securities with the 'Caisse des Depots et Consignations' (Government Deposit Bank) to be exclusively used, as well as the interests thereof, to the purchase, constructions, decora-

App. Div.]

First Department, February, 1912.

tion or repairs of buildings or fixtures destined for the needs of the association or union."

The Faculté de Théologie Protestante de Montauban is a superior school for the teaching of theology. Its purpose is to educate Protestant ministers of the gospel. It originated in the sixteenth century. From 1598 to 1659 it existed under the name of L'Academie Protestante de Montauban. It was transported to Puylaurens in 1659 and there existed until 1685 when it was returned to Montauban. Under the concordat entered into between Pius VII and the First Consul, July 15, 1801, and by decrees of 1808 and December 8, 1809, it was reconstituted by the French government. Since that decree it has been considered by the French jurisprudence as a public institution and it was supported by appropriations of funds from the budgets of the French government.

As appears from the testimony of the French attorney at law, "before the law of December 9th, 1905, the faculty of Montauban was a public institution and a moral person; that is to say, it had a legal entity like a natural person, and therefore it had the capacity of acquiring property for a consideration * * * or gratuitously, * * * by gift or legacy. * * * It could act in justice and acquire property just the same as an individual person. * * * Therefore, I think the Faculty of Theology of Montauban corresponded to an American incorporated association." Its character was religious; its business the teaching of theology; its purpose the training of its students for the profession of Protestant ministers of the gospel.

As such public institution it not only received government moneys, but its faculty and officers were appointed by the State. With all the other religious bodies which had since the concordat been so constituted and in receipt of public moneys, it was "suppressed" by the law of December 9, 1905, as a public institution, and, therefore, separated from the French government. That is, it ceased to receive public moneys and the State authorities ceased to appoint its faculty and other officers. While it thus lost its official public character, it still exists in fact as a free faculty. The said law did not demolish said faculty and a decree of the president of the republic of June, 1907, acknowledged its existence *de facto* since it attrib-

First Department, February, 1912.[Vol. 149.]

uted its property to the Union Nationale. There has been no interruption in its existence. It has pay students and scholarship students, exactly as before the Separation Act; its course of instruction is the same and it has the same professors. It is located in the same place, has the same rooms, library and furniture. It remains identically the same organization as before the act with the exception that it has lost its public character.

This faculty accepted the law of 1905 and an association or union was formed under the law—The National Union of the Evangelical Reformed Churches of France. The French expert testified: "It was not the intention of the law of Dec., 1905, to render impossible religious worship and the recruiting of ministers of the gospel. Therefore, in Title 4 it permitted the organization of cultual associations which were to take the place of the public establishments that were to disappear. The Union Nationale des Eglises Réformées Evangéliques de France is a union of cultual associations formed to administer Protestant religion in France. The organization of such unions was permitted in Art. 20 of the law of December 9th, 1905. * * * It originated in 1906 * * * by the union or amalgamation of several cultual associations. * * * After being duly declared it has a judicial capacity; that is to say, the capacity of suing and being sued, but its capacity of acquiring property is limited by Article 33 and the following articles of the decree of March 16th, 1906."

By the decree it was provided: "Article 1. There are attributed to the National Union of the Evangelical Reformed Churches of France with its special destination the personal property hereinafter designated which has belonged to the Faculty of Protestant Theology of Montauban suppressed from November 1st, 1906, in execution of the laws of December 9th, 1905, and July 20th, 1906, and to the Seminary connected with the said Faculty, to wit: 1. The funds in hand and the sums deposited at the Treasury. 2. The sums deposited at the Government Deposit Bank, and especially those coming from the Aurillon legacy (Decree May 23rd, 1883). 3. A certificate (nominative) of government stock 3%. Series 5th No. 558,267, amounting to Frs. 310 (Bequest of Marie Dupuy, wife of Guedon, and bequest Paul Guedon). 4. The collections and labora-

App. Div.]

First Department, February, 1912.

tory instruments, books, household furniture and other personal objects being in the premises occupied at the date of October 31st, 1906, by the Faculty of Theology and the Seminary connected therewith, excepting the books and personal objects which shall be, after inventory, recognized as belonging to the library of the University of Toulouse (Theological Department). Article II. The sums proceeding from the Aurillon bequest shall remain deposited at the Government Bank of Deposits. The loans to students, to which said bequest is destined, shall be made in conformity with the clauses of the Testament and in the conditions provided for by special regulations made by the National Union of the Evangelical Reformed Churches of France."

The learned surrogate has held that "The legatee named by the testatrix had, therefore, no capacity to take title to the legacy at the time of her death. Considered as a bequest in trust for the class of persons mentioned by the testatrix, to wit, poor young men, preferably ministers' sons, desiring to become ministers of the Gospel, for whose education the income of the fund was designed by her to support scholarships under the control of the faculty named in her will, it does not appear from any provision of French law submitted in evidence that the claimant has power to receive it as trustee for that purpose." And, referring to the Union Nationale des Eglises Reformées Evangéliques de France, he said: "There is no power given to the claimant, either by the said decree or by the Separation Act, so far as their provisions are in evidence, to take property by foundation, that is to say, by way of trust or other provision of a continuing nature, except that contained in Article 33, which limits such foundations strictly to remuneration for ceremonies and religious services;" and hence determined that the legacy must be distributed as part of the residuary estate.

The testatrix had been domiciled in this State, and her personal property attempted to be disposed of by her will being located here, all questions relating thereto are primarily to be governed by the laws of this State. There can be no doubt but that she intended to create a trust for a perfectly proper and legal charitable use, the income of the fund to be used

First Department, February, 1912.

[Vol. 149.]

for free scholarships for the education by the Faculté de Théologie Protestante of Protestant ministers of the Gospel. Such purpose has been recognized as a charitable use from the earliest times.

Chapter 701 of the Laws of 1893, as amended by chapter 291 of the Laws of 1901 (now Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 12, as amd. by Laws of 1909, chap. 144;* Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 113, as amd. by Laws of 1909, chap. 144), provides as follows: "Section 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects, be valid under the Laws of this State, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court. § 2. The Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act * * *. The Attorney-General shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the court."

Being a valid trust for a charitable use, it is claimed, and the surrogate has held, that it must fail solely because of a want of capacity to take under the French law. Assuming that the surrogate was right, that neither the Faculté nor the Union had the capacity to take, we have the situation presented of a valid trust for a charitable use where no trustee was named by the testatrix, or where the trustee named is incapable of acting. It is a familiar rule of equity that no trust shall fail for want of a trustee. In *Allen v. Stevens* (161 N. Y. 122) Chief Judge PARKER said: "As this statute is remedial in its character, it should be liberally construed with a view to the beneficial end proposed. * * * Under the provisions of the act a testator may name a corporation as trustee, or provide that a

* See Laws of 1911, chap. 226, adding subd. 4 to § 12.—[REP.]

App. Div.}First Department, February, 1912.

corporation to be founded shall act as trustee, or the trustee named may be an individual; but if he name none of these, the statute provides in effect that the trust shall not fail, but the title to the property devised or bequeathed in trust shall vest in the Supreme Court, which shall have control over gifts, grants, bequests and devises provided for by the act."

In *Matter of Griffin* (167 N. Y. 71, 81) Judge GRAY said: "In naming as trustee a corporation incapable of acting as such, the case is the same as if no trustee had been named in the will and under the provisions of the act, in such event, the property vested in the Supreme Court, which is charged with the duty of administering the trust for the benefit of the beneficiary. To hold otherwise would be to narrow the construction of the act of 1893 and to deny to it that practical effect, which will make it operative to save gifts to religious, charitable, educational and benevolent uses. As was formerly the rule in equity, so with this statute in force, a trust shall never fail for want of a trustee to execute it."

In *Bowman v. Domestic & Foreign Missionary Society* (182 N. Y. 494) the will provided as follows: "I give, devise and bequeath the sum of two thousand dollars to be equally divided between the Indian Missions and Domestic Missions of the United States in memoriam of the late Mary A. Archer." WERNER, J., said: "The respondent, the Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States of America, was duly incorporated under the laws of this State, having for its purpose the general conduct of missionary operations in all lands. This society claims to be entitled to the bequest. * * * We think the trial court correctly held that the clause in question, even when read in connection with evidence adduced at the trial, was too indefinite to be construed as a direct bequest either to the defendant or to any other beneficiary. But we are also of the opinion that the bequest did not fail and that it can be supported as a trust for charitable purposes under the provisions of chapter 701 of the Laws of 1893, as amended by chapter 291 of the Laws of 1901. * * * The effect of this statute, as demonstrated in the case of *Allen v. Stevens* (161 N. Y. 122), was to restore the ancient doctrine of charitable uses and trusts as a part of the

First Department, February, 1912.

[Vol. 149.]

law of this State, and the statute was designed to cover just such a case as the one at bar. The obvious purpose of the testatrix was to have this fund distributed for the benefit of domestic and Indian missions. She was a regular member, attendant and communicant of the Protestant Episcopal Church, and actively engaged in the charitable work carried on through its instrumentality. The defendant is the organized medium through which the Protestant Episcopal Church of America carries on its missionary operations, which include work in the western States and territories among the Indians, negroes and white people, and in the prosecution of which large sums are disbursed every year. The ninth clause, supplemented by the evidence, sufficiently indicates the charitable purpose to which the testatrix desired to apply her bequest to enable the Supreme Court, under the power derived from the statute, to administer this as a trust in which the beneficiary or trustee is not named or designated with absolute certainty or correctness. This it can do through the instrumentality of a trustee appointed by it. If that course is deemed wise the court will doubtless be influenced in the choice of a trustee by the nature of the charity to be administered and may appoint the defendant as the medium best adapted to accomplish the end sought."

In *Mount v. Tuttle* (183 N. Y. 358) the will gave, devised and bequeathed unto the Rev. Daniel S. Tuttle, bishop of Utah, the Protestant Episcopal missionary bishop of Utah and Idaho, in his corporate capacity, and to his successor or successors in office, the sum of \$20,000, "In trust, nevertheless, to erect therewith, at such place within the limits of his Episcopal jurisdiction, as he, his successor or successors, shall select, a Protestant Episcopal Church building to God's glory, and the further sum of Five thousand $\frac{00}{00}$ Dollars, In Trust, nevertheless, to erect therewith in the same place, a rectory for the rector or clergyman in charge of said church, to be the property of the aforesaid Protestant Episcopal jurisdiction." Chief Judge CULLEN said: "At the time of the testatrix's death there was no such corporation as the Protestant Episcopal jurisdiction or church of Utah and Idaho, nor has any such corporation since been created. The trial court found as matters of fact that said

App. Div.]

First Department, February, 1912.

gifts were void and invalid under the laws of Utah and of Idaho, and awarded the fund to the next of kin of the testatrix. * * * The principal discussion in the learned Appellate Division seems to have turned on the question how far our recent statute regulating gifts for charitable purposes (Laws 1893, chap. 701) has extraterritorial effect. We will assume that were the gift to be administered within this State its validity would be upheld under the statute cited. (*Allen v. Stevens*, 161 N. Y. 122.) The majority of the Appellate Division held that the validity of the trust or gift was to be determined by the laws of Utah and Idaho, not by those of this State. The learned judge who wrote for the minority of the court was of opinion that as the trust was valid under the laws of this State the trustees could be compelled to designate beneficiaries, who, being then made certain instead of, as before, indefinite, could secure an enforcement of the trust in the courts of any State, and thus the administration of the trust be independent of the laws of that State. * * * We are of opinion that the validity of a gift or trust under such circumstances depends on the extent to which it is necessary that the administration should be had in the foreign jurisdiction. For example, we do not at present see why a legacy given by a citizen of this State, even to a foreign trustee in trust to distribute the principal or the annual income among poor clergymen in a foreign State, could not be upheld, though such a trust was invalid by the laws of that State. The laws of a State on the subject of trusts are intended to regulate the tenure of property therein. (*Hope v. Brewer*, 136 N. Y. 138.) We imagine that in no jurisdiction are human beings of age and of sound mind incompetent to receive money or personal property. Therefore, in the case suggested there would seem no difficulty, despite the non-residence of the trustee, in retaining the fund here where the tenure would be legal and in remitting the money as it might become payable to the foreign beneficiaries." This expression of the views of the Court of Appeals exactly applies to this case.

In *Matter of Robinson* (203 N. Y. 380) the testatrix gave the residue of her estate to two persons named, in trust, however,

First Department, February, 1912.

[VOL. 149.]

for the following uses and purposes, to wit: To provide shelter, necessaries of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such persons as they shall select as being in need of the same. Preference is to be given to persons who are elderly or disabled from work, and to persons who are Christians, of good moral character, members of one of the so-called Evangelical churches, to wit, the Methodist, Baptist, Presbyterian, Congregational, Moravian or Episcopal, and who are not addicted to the use of intoxicants or tobacco, nor to attendance at theatrical entertainments. CHASE, J., said: "Gifts for religious, educational, charitable or benevolent uses, to indefinite or uncertain beneficiaries, are now permitted in this State by express provision of statute. * * * The law relating to gifts for charitable uses as it existed prior to chapter 701 of the Laws of 1893, which was substantially re-enacted in said Personal Property Law and said Real Property Law, has been changed. * * * The spirit of love and religion which is the basis of charity should be exercised in construing the provisions of such acts. A will, however, must sufficiently define the beneficiaries and the purpose of the testator so that the trust can be enforced by the courts, otherwise the will does not come within the provisions of the acts. The gifts must be also for a public and not for a private purpose. * * * It being determined from the will that the trust and the purpose of the testatrix in her attempt to establish it are for the uses enumerated in the statute, the courts can and will, at the suit of the Attorney-General of the State, compel the trustees to carry out the same according to such purpose and for such uses. Trusts otherwise valid under the acts mentioned are sustained, although the beneficiaries are not necessarily or in terms confined to residents of this State." (Citing cases, including *Manley v. Fiske*, 139 App. Div. 665; affd., 201 N. Y. 546.)

In the latter case, opinion by Mr. Justice MILLER, an American citizen, domiciled in England, left personal property in England and the State of New York. He disposed of his property in New York by what is termed the American will. The provisions of the will were as follows: "After the above legacies are paid without unnecessary delay, the sum remaining I desire

App. Div.]

First Department, February, 1912.

my executors to divide the surplus among such American charities they may think well of, and I would like these sums to be given to any society that assist poor needlewomen (seamstresses) whose toil is so poorly requited. If no such organization exists, the money to be divided for the benefit of incapacitated sailors and their families." The court said: "The appellants contend that no trust was created or intended, and that the bequest is void for indefiniteness. There can be no doubt that the bequest would be void but for chapter 701 of the Laws of 1893, as amended by chapter 291 of the Laws of 1901. The appellants contend that the purpose as well as the beneficiaries of the gift are indefinite and that the statute only saved gifts which would otherwise have been void for indefiniteness of beneficiary. * * * The primary purpose of the bequest was, then, to assist poor needlewomen. The beneficiaries alone are indefinite, and the case comes directly within the statute. It is next contended, however, that the statute was intended only to save trusts for charitable uses, and that no trust was created. It is true that there are no express words creating a trust, as there are no express words of gift; but it is quite plain that a trust was intended. A trust is almost inseparably involved with a gift for charitable uses, and the statute provides for the case of a failure to select a trustee as well as for the case of indefiniteness of beneficiary. In case no trustee is named the title vests in the Supreme Court."

Applying the principle of the foregoing cases, it seems to me that it is our duty to declare that this legacy has not lapsed, but that it is the duty of the Supreme Court to undertake the execution of the trust for the charitable uses created by the testatrix. As said by Chief Judge CULLEN in *Mount v. Tuttle* (*supra*): "We imagine that in no jurisdiction are human beings of age and of sound mind incompetent to receive money or personal property. Therefore, in the case suggested there would seem no difficulty, despite the non-residence of the trustee, in retaining the fund here where the tenure would be legal and in remitting the money as it might become payable to the foreign beneficiaries."

As the Faculté de Théologie continues to exist as a *de facto* school of theology, and as it is entitled to receive payment for

First Department, February, 1912.

[Vol. 149.]

its teachings and as it has pay and scholarship students, it would seem that there would be no difficulty whatever in transmitting the income of the trust fund here retained to accomplish the beneficent and charitable purpose of the testatrix.

So much of the decree of the surrogate as adjudges that the legacy has lapsed and should be distributed to the residuary legatees should be reversed and it should be decreed that a valid trust for a charitable use was created by the will and that the legal title to such trust estate has vested in the Supreme Court and it is charged with the duty of executing the same.

Final judgment to be settled on notice to all parties including the Attorney-General which should contain the provisions to enforce such trust as is provided in section 12 of the Personal Property Law, with costs to all parties appearing and filing briefs in this court on the appeal, to be paid out of the fund.

INGRAHAM, P. J., SCOTT and MILLER, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

On the 24th day of February, 1907, Louise H. Leclerc died, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of the county of New York on the 10th day of June, 1907, and letters testamentary were duly issued thereunder.

The 11th clause or paragraph of her will has been adjudged by the decree from which the appeal is taken to be invalid, and the legacy thereby given has been directed to be distributed as part of the residuary estate. The provisions of the will which have been declared void are as follows: "I give and bequeath to the Faculté de Théologie Protestante de Montauban, in France, One Hundred thousand francs of the currency of France, to be held in trust, to invest and keep the same invested and drawing interest and to apply the interest and income therefrom yearly and every year to as many free scholarships under the control of said Faculté as said yearly interest will pay for or allow. Such scholarships to be granted, *first*, to the sons of poor clergymen in France intending to become ministers of the gospel, as may desire the same, and, *secondly*, in the absence of such to any poor young men wish-

App. Div.]

First Department, February, 1912.

ing to become ministers of the gospel or missionaries. It is my desire that this fund or endowment may bear my mother's name and be known and designated as the 'Fonds Guinaud,' and to her memory I institute and dedicate the same."

The testatrix was a native of Paris, France, but at the time of making the will, on the 9th day of July, 1886, and of her death, she was domiciled in New York. When she made the will the Faculté de Théologie Protestante de Montauban was "a public establishment and had a legal entity," could take property "by gift or legacy" and hold and administer the same and could sue and be sued. It occupied under the laws of France a position similar to that occupied by corporations in this country. It and its predecessor had existed since 1698, and it was reconstituted by a decree of the French government on the 8th day of December, 1809. It was supported in part by appropriations of public funds. It was a religious institution engaged in teaching theology and training "students for the profession of Protestant Ministers of the Gospel." It was suppressed as a public institution or establishment by a statute known as the "Separation Act," which took effect on the 11th day of December, 1905. That statute authorized the "attribution" of the property of the institutions, suppressed as public institutions, to "cultural associations," to be organized under a governmental decree, which was made on the 16th day of March, 1906. Although suppressed as a public institution or establishment it appears by expert testimony with respect to the French law that it still exists, *de facto*, and is carrying on the same work by the same professors, with the exception of three who have retired, and at the same place and in substantially the same manner, and that it is enabled to do so by funds received from the Union Nationale des Eglises Réformées Evangéliques de France, a union of cultural associations created pursuant to the provisions of the "Separation Act" on the 2d day of February, 1906, for the administration of Protestant religion in France, to which the property of the Faculté de Théologie Protestante de Montauban, and that of all other Protestant religious organizations, orders and institutions in France, was "attributed" or transferred and turned over as authorized by the "Separation Act." Such transfer from this

First Department, February, 1912.

[Vol. 149.]

legatee included two special "foundations" or endowments. There is also evidence to the effect that the legatee continues to receive pay students and to maintain free scholarships as well. The scheme of the "Separation Act" was to have the property of the suppressed organizations, institutions and orders transferred to a corporate entity to be created by a decree of the president of the republic of France, to be administered by it for the purposes for which the property had been received and was held, but, in effect, under government supervision and with restrictions, in the interests of the public policy of France as shown by the statute and decrees thereunder, by which the amount of property to be received and held for such purposes was limited. The evidence shows that the legatee was without authority to receive this legacy at the time of the death of the testatrix.

This was a bequest to a foreign corporate entity on condition, or in a limited sense, in trust, to hold the corpus in perpetuity and to apply the income to a particular purpose, which was one of the principal functions performed by the legatee; but there was no trust in the strict sense in which that term is used with respect to the title to or ownership of property, and, therefore, this legacy did not contravene our statutes with respect to perpetuities and accumulations of income. (*Williams v. Williams*, 8 N. Y. 525; *Wetmore v. Parker*, 52 id. 450, 459; *Fosdick v. Town of Hempstead*, 125 id. 581, 595; *Matter of Griffin*, 167 id. 71; *First Presbyterian Church v. McKallor*, 35 App. Div. 98.) The validity of a bequest for a charitable use to a foreign corporation to be administered abroad depends upon the foreign law, but is to be determined by the courts of the domicile of the testator. (*Robb v. Washington & Jefferson College*, 103 App. Div. 327; affd. on this point, 185 N. Y. 485; *St John v. Andrews Institute*, 117 App. Div. 698, 714; *Matter of Huss*, 126 N. Y. 537; *Matter of Sturgis*, 164 id. 485.) There was here no gift in trust save in the sense that every gift to a charitable use in perpetuity involves a trust relationship, and is subject to supervision by the law and courts of the jurisdiction in which it is to be administered, and the gift was direct without the intervention of a trustee. (*Catt v. Catt*, 118 App. Div. 742, 750; *Matter of Griffin, supra*; *Bird v.*

App. Div.] First Department, February, 1912.

Merklee, 144 N. Y. 544; *Wetmore v. Parker*, *supra*; *St. John v. Andrews Institute*, *supra*.) I am of opinion that chapter 701 of the Laws of 1893, as amended by chapter 291 of the Laws of 1901, has no application to the case at bar. Those statutory provisions literally apply only to bequests and devises of property for charitable uses otherwise valid under the laws of New York, but theretofore void or incapable of enforcement for want of a trustee, or uncertainty, or indefiniteness, with respect to the beneficiaries, and, in so far as they relate to trusts, their operation does not extend to a bequest for a charitable use to be administered in a foreign jurisdiction. In *Allen v. Stevens* (161 N. Y. 122) the statute received a very liberal construction, and it was held that it restored the doctrine of charitable uses and trusts in effect as declared in *Williams v. Williams* (*supra*), by which a trust does not fail for want of a competent trustee, or for indefiniteness or uncertainty with respect to the beneficiaries, and that it was no longer essential to the validity of a trust for a charitable use in perpetuity that it be to a corporation existing or to be created within two lives in being; but that decision has no bearing on the question presented for decision. I do not agree with the view that this bequest is subject to the construction that it involves an express trust for a definite beneficiary which is capable of administration by a trustee other than the legatee, the income to be paid to the legatee, which has been suppressed as a public establishment or institution.

I am also of opinion that if this bequest were construed as an attempt to make a bequest on an express trust it could not be sustained. In that view the legatee would be both trustee and beneficiary, and under the well-settled rule the trust would merge. (*Robb v. Washington & Jefferson College*, *supra*.) In a sense of course the students selected for the free scholarships would be beneficiaries, but the testatrix did not contemplate that they should receive the income, although she attempted to provide that they should be benefited thereby. The vulnerable point in such a theory of construction is that the trust, whether it be regarded strictly as an express trust, or in the broad sense that every bequest to a charitable use in

perpetuity involves a trust relationship, is that the trust or trust relationship does not end with the investment of the funds and collections of income, for it is not contemplated that the income shall be paid over to certain students selected by the legatee or otherwise to be used by them in educating themselves for the profession of Protestant ministers, but it continues with respect to the application of the income to accomplish the purposes intended by the testatrix, and this was to be done, not by distributing the income to individuals, but by using it in defraying the expenses of educating them for the Protestant ministry. The principal and vital part, therefore, of the trust, considered in any aspect, required the administration of the income in France, and by the legatee, for the particular purpose expressed in the will. In so far as the trust is to be administered in France it is quite clear that chapter 701 of the Laws of 1893, as amended, affords no authority for the courts of this State to act as trustee, and they have no inherent or other authority to administer a trust in a foreign State or country. (*Catt v. Catt, supra.*)

It is manifest that there could be no supervision by our courts, and it does not appear that there could or would be any by the courts of France over the use of the income if paid over to it as proposed by the majority opinion. The title and beneficial use are here given to the legatee. The legatee having no authority to take this legacy at the time of the death of the testatrix the bequest was void (*Owens v. Missionary Society of M. E. Church*, 14 N. Y. 380; approved in *Mount v. Tuttle*, 183 id. 366; *St. John v. Andrews Institute, supra*; *White v. Howard*, 46 N. Y. 144; *Murray v. Miller*, No. 1, 85 App. Div. 414; affd., 178 N. Y. 316), and it lapsed and became part of the residuary estate. (*Carter v. Board of Education*, 144 N. Y. 621; *Holland v. Alcock*, 108 id. 312.)

I am of opinion, therefore, that the decree was right and should be affirmed.

Decree, in part, reversed, and final decree directed to be entered as indicated in opinion, with costs to be paid out of the fund to all parties appearing and filing briefs in this court. Order to be settled on notice to all parties, including the Attorney-General.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
CHARLES H. HYDE, Appellant.

First Department, February 16, 1912.

Crime — change of venue — when change granted — effect of previous applications for speedy trial.

A defendant may apply for a change of the place of trial of a criminal action on the ground that a fair trial cannot be had in the county where the venue is laid.

Whether or not the application should be granted is to be determined by the exercise of judicial discretion and each case must be decided upon its own facts. It is enough if the court can find that in all human probability such a condition exists.

Where a defendant has made three applications for a speedy trial in the county where the indictment was found and has succeeded in procuring a removal of his case to the Court of General Sessions on the ground that the Supreme Court would adjourn for the summer months and has urged the vacating of a stay which had been granted, the court on his motion to change the place of trial may look upon the precedent publications upon which he now relies to show a prejudiced public from which a fair jury could not be drawn in the same light that the defendant did when strenuously insisting upon a speedy trial and may confine its examination to matters occurring thereafter.

APPEAL by the defendant, Charles H. Hyde, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of January, 1912, denying the defendant's motion for a change of venue.

John B. Stanchfield, for the appellant.

Robert C. Taylor of counsel [*Robert S. Johnstone* with him on the brief], *Charles S. Whitman*, *District Attorney*, for the respondent.

CLARKE, J.:

On May 11, 1911, a superseding indictment was found by the grand jury of the county of New York charging the defendant, then chamberlain of the city of New York, with the crime of bribery in two counts, and in two further counts with the offense of asking, receiving and agreeing to receive a gratuity

First Department, February, 1912.

[Vol. 149.]

for performing an official act. To this indictment he plead not guilty.

On June fifth the defendant made a motion before the April term, continued, of the Criminal Term of the Supreme Court to fix a day for trial, which was opposed by the district attorney on the ground that the ends of justice required that the cases of *People v. Reichmann* and *People v. Cummins*, in which indictments had been found prior to that against the defendant, should be tried in the order stated and prior to the trial of the case against the defendant. The presiding justice denied the motion, with leave to renew at the June Criminal Term. On June seventh the same motion was made before the June term of the Criminal Term of the Supreme Court and was opposed by the district attorney upon the same grounds and was also denied by the justice there presiding.

On June fifteenth the trial of *People v. Reichmann* began before the April term, continued, and said Reichmann was found guilty on the twenty-eighth day of June. On the twenty-ninth of June the defendant moved before the June term of the Criminal Term of the Supreme Court for an order transferring the indictment to the Court of General Sessions of the city and county of New York for trial. On the thirteenth of July the justice there presiding granted the motion. Thereafter the district attorney served a notice of appeal from said order, and on the fifteenth of July an order was granted by the presiding justice of the Appellate Division staying the trial of said action until after the hearing and determination of the said appeal. On the twenty-seventh of July a motion was argued before the presiding justice for an order vacating said stay, which was denied. The appeal was dismissed by an order of this court on November 3, 1911, and on November sixth an order was made by the Supreme Court transferring the case for trial from the General Sessions back to the Supreme Court.

On October seventeenth the case of *People v. Cummins* was brought on for trial in the Supreme Court, April term, continued, and was continued until November twentieth, on which day the jury found a verdict of guilty and Cummins was sentenced on said verdict on the twenty-fourth of Novem-

App. Div.]First Department, February, 1912.

ber. On said day the district attorney made a motion to have the case of *People v. Hyde* set down for trial and fix a day therefor, and the court ordered that the case be set down for trial at the January term, and the 2d day of January, 1912, was fixed as the day therefor. On December 28, 1911, the district attorney served a notice of motion for a special jury, returnable at the Criminal Term of the Supreme Court on January 2, 1912.

On December 26, 1911, the defendant made a motion, returnable at Special Term, Part 1, on January 5, 1912, for an order of removal of said criminal action to a term of the Supreme Court held in and for some other county in the State of New York, upon the ground that a fair and impartial trial could not be had by said defendant in the county of New York. The said motion having been denied by the Special Term, the defendant appeals.

To sustain his claim that he cannot have a fair and impartial trial in the county of New York the appellant has submitted voluminous affidavits and a large mass of newspaper clippings. The claim is made that the extensive publications in the public prints of articles referring to him have created such a prejudicial atmosphere in the community that a fair-minded jury cannot be impaneled to try him upon the indictment found against him; that the members of any jury impaneled for that purpose will be so affected that they will not observe the fundamental rules of law in a criminal case, that the defendant is presumed to be innocent until proved guilty, and that he is entitled to the benefit of a reasonable doubt upon every material point in the case.

The defendant had a right to make this motion. It is expressly provided for in section 344 of the Code of Criminal Procedure. In *People v. McLaughlin* (150 N. Y. 365) the court said: "The right to remove the place of trial from one county to another, where a fair and impartial trial cannot be had in the county where the indictment is pending, has long existed. It existed at common law, and was subsequently incorporated into the statutes of the State. The provisions of the Code of Criminal Procedure upon the subject have been evolved from previous legislation and, so far as they extend,

First Department, February, 1912.

[Vol. 149.]

now contain the rule of law governing such an application. * * * That the right thus given is a substantial one and has always been regarded as of great importance to a defendant, is manifest not only from the time it has existed, but also from its paramount necessity to fairly protect his just rights and interests. The right of every person accused of crime to have a fair and impartial trial before an unbiased court and an unprejudiced jury, is a fundamental principle of criminal jurisprudence."

Whether or not the application should be granted is to be determined by the wise exercise of judicial discretion, and each case must be decided upon its own facts. Of course there can be no certainty established in regard to such a future event. It is enough if the court can find that in all human probability such a condition exists. In *People v. Georger* (109 App. Div. 111) Mr. Presiding Justice MCLENNAN said: "Without going into detail as to the character of the opinions expressed, all to the effect that the defendant was culpable and wholly responsible for the difficulties in which the bank was involved, it is sufficient to say that by the quotations from the public press contained in the record, from the opinions of parties interested, assembled to consider the situation, from the expressions of citizens who met and casually discussed the matter, it would seem that the community was practically a unit in concluding that the defendant had been guilty of serious wrongdoing and which resulted in or caused the failure of the bank."

If this court was satisfied that a fair and impartial jury could not be obtained in the county of New York to try the defendant upon the indictment found against him, "that the community was practically a unit in concluding" him guilty, it would be its duty—and it would not hesitate—to reverse the order appealed from and grant the motion for a change of venue. But we reach no such conclusion upon this record. It is true that the defendant, by reason of his connection with public affairs, has had a mass of matter published about him in the public prints. He calls attention to numerous publications growing out of an investigation by a committee of the Legislature of charges of the raising of large sums of money to influence legislation respecting the race tracks, to the

App. Div.] First Department, February, 1912.

indictment and trial of a member of the Legislature who was acquitted upon such trial, and to the fact of defendant's absence from the city during the latter part of the period during which said legislative committee sat.

None of those matters had anything to do with the alleged misconduct for which he has been indicted and said publications antedated the finding of said indictment. Notwithstanding the articles, cartoons and poems, the insinuations, suggestions, and even abuse of which he complains, relating to those matters as aforesaid, antedating the finding of the indictment, he made three applications in the summer of 1911 for a speedy trial in the county of New York and succeeded in procuring a removal of the case to the Court of General Sessions in July, upon the ground that he was entitled to a speedy trial and that the Supreme Court, in which the indictment was pending, would adjourn for the summer months, and as late as the 27th of July, 1911, he was urging the vacating of the stay which had been granted in order to enable him to get a speedy trial in New York county.

So that this court may fairly look at the precedent publications, upon which he now relies to show a prejudiced public from which a fair jury could not be drawn, in the same light that he did when strenuously insisting upon a speedy trial. We may with propriety, I think, confine our examination to matters occurring thereafter.

He alludes to the trials growing out of the failure of the Carnegie Trust Company. At the time he made his application for the transfer of the indictment to the General Sessions Reichmann had been tried. Only 62 talesmen were examined and a jury was selected in less than one court day upon that trial. Upon the trial of Cummins only 165 talesmen were examined and a jury was secured in less than three days. Defendant was not indicted for the crimes for which Reichmann and Cummins were indicted. He has been indicted for taking bribes or gratuities, as a public officer, to affect his official conduct.

There is little or no evidence of a wide-spread public belief of his guilt or innocence of the charge brought against him. Section 376, subdivision 2, of the Code of Criminal Procedure pro-

First Department, February, 1912.

[Vol. 149.]

vides: "But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath that he believes that such opinion or impression will not influence his verdict and that he can render an impartial verdict according to the evidence and the court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict."

Impressions made by reading the newspapers are ephemeral, and jurors in this country have, in a number of notable cases, although surrounded by evidence of great popular feeling, not been swayed thereby. Considering the population of New York county, its large general jury list and its carefully selected special jury, we feel perfectly confident that it is not necessary to send this indictment for trial to any other county to enable the defendant to enjoy his undoubted right to a fair and impartial jury.

We have given the papers submitted careful and painstaking attention and are satisfied that the learned Special Term correctly disposed of this motion and that the order appealed from should be affirmed.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and MILLER, JJ., concurred.

Order affirmed.

PALMER AND SINGER MANUFACTURING COMPANY and KNICKERBOCKER GARAGE, Respondents, *v.* BARNEY ESTATE COMPANY, Appellant.

First Department, February 16, 1912.

Landlord and tenant — lease — failure to pay rent on day fixed — custom of parties — forfeiture — when equity will not decree cancellation of lease.

Forfeitures are not favored in equity.

The purpose of a clause in a lease providing that in case of default by the tenant in any of the covenants, the landlord may at his option terminate

App. Div.] First Department, February, 1912.

the lease on thirty days' notice or may re-enter and resume possession, and may relet the same for the balance of the term for account of the tenant, the tenant to make good any deficiency, is to secure the payment of the rent reserved.

Such clause ordinarily should not be permitted to be used by the landlord to regain possession of a valuable piece of property whose rental value has substantially increased since the making of the lease.

Where a lease for a period of ten years at an annual rent of \$19,500 provided that the rent should be paid quarterly in advance and a custom grew up between the landlord and tenant during the first two years of the term whereby the payment on the first day of the quarter was not insisted upon, the landlord cannot cancel the lease and dispossess the tenant at the beginning of the third year because there was a twenty-one days' delay in the payment of the quarterly rent, if it appears that six days before the service of the notice canceling the lease the president of the landlord corporation talked with the tenant's vice-president about the rent then due but made no suggestion that the lease would be canceled unless the same was paid at once and if the tenant as soon as the notice of cancellation was served sent the landlord a check for the full amount due, with interest from the first day of the quarter.

APPEAL by the defendant, the Barney Estate Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 17th day of November, 1911, upon the decision of the court rendered after a trial at the New York Special Term, and also, as stated in the notice of appeal, from the decision upon which said judgment was entered.

The judgment granted a permanent injunction restraining the defendant as landlord from interfering with plaintiffs' possession of certain premises under a lease, and from prosecuting or continuing pending summary proceedings to dispossess.

Walter E. Hope of counsel [*Masten & Nichols*, attorneys], for the appellant.

Jay Noble Emley, for the respondents.

CLARKE, J.:

The defendant is the owner in fee and landlord of certain premises known as 1618 and 1620 Broadway, in the borough of Manhattan, and the plaintiffs are tenants thereof under a lease entered into in 1906 between the then owner of the property and plaintiffs' assignor. The said lease was for a term of ten years,

and provided for an annual rent of \$19,500, to be paid in advance in equal quarterly payments.

The said lease further provided: "*Ninth.* In case of default by said tenant in any of the covenants herein contained or in case the whole or any part of said premises shall become vacant, the landlord may at his option terminate this lease at any time by giving thirty days previous notice to the tenant, said notice to be left on the premises with any person in charge thereof, or to be affixed upon a conspicuous part of the premises, if they are vacant; or the landlord may at his option re-enter the said premises and resume possession thereof, either by force or otherwise, without being liable for any prosecution therefor, and re-let the same during the remainder of the term, at the best rent that he can obtain for account of the tenant who shall make good any deficiency."

The Special Term has found as a fact that said 9th clause of the lease herein, so far as same was applicable to the covenant to pay rent, was inserted as a security merely for such payment, and was so regarded by the parties.

The building which it was contemplated would be erected upon the premises was completed and the tenants entered into occupation of the same under the terms and provisions of the said lease on the 18th day of January, 1908, and on that day paid the first quarterly installment of rent in advance. Quarterly installments of rent in advance were thereafter paid as follows:

Due according to lease.	Paid by check dated.
April 18, 1908.	April 18, 1908.
July 18, 1908.	July 18, 1908.
Oct. 18, 1908.	Oct. 19, 1908.
Jan. 18, 1909.	Feb. 18, 1909.
April 18, 1909.	April 20, 1909.
July 18, 1909.	July 21, 1909.
Oct. 18, 1909.	Nov. 3, 1909.

The court has found that payment of rent on the first day of each quarter had not been insisted upon; that only the first three quarterly installments out of eight were paid at the beginning of the quarter; that a custom had grown up between the landlord and the tenants of accepting and paying the rent on a

App. Div.] First Department, February, 1912.

day subsequent to the beginning of each quarter; that this custom was relied upon by the plaintiffs almost continuously throughout the whole term of the lease and was recognized by both plaintiffs and defendant as a custom binding upon both of them and such custom was in full force and effect on the 18th day of January, 1910; that the quarterly installment of rent in advance due said January 18, 1910, according to the terms of the lease, was not paid on that date, and on January 29, 1910, defendant wrote: "We take the liberty of calling your attention to the fact that your rent due January 19th amounting to \$4,875 is still unpaid. Kindly favor us with your check for the amount by return mail." And there was inclosed therewith a statement dated February 1, 1910: "To amount of rent due on garage building 1620/1624 Broadway, Jany. 18/April 18, \$4,875."

The vice-president of the defendant company testified that after he wrote the letter of January twenty-ninth he had a telephone conversation with the president of the plaintiff companies, whom he had called up on the first, second or third of February: "The substance of it was that I would like a check. Mr. Singer said it would be sent. That is all there was said. There was not anything said about cancelling the lease. It was not referred to at all. Nothing was said to indicate that because the rent had not been paid two or three weeks before that we would not take the rent. We were willing to take the rent at that time. I asked him for it. I have said I didn't say anything to him when I asked him for that rent, that if he didn't send it down we would cancel the lease."

On February 9, 1910, the rent still being unpaid, the landlord served upon the plaintiffs the following notice: "You and each of you are hereby notified that Barney Estate Company, Landlord * * * in consequence of the default of the tenant under said lease to pay the rental therein covenanted to be paid hereby elects to terminate the said indenture of lease upon the 12th day of March, 1910, in accordance with the provision thereunto provided. Thirty days previous notice of such termination is hereby given in accordance with the terms of said lease and you are hereby notified to deliver up and vacate the said premises on or before said 12th day of March, 1910."

Immediately upon receipt thereof, plaintiffs' treasurer telephoned and offered to immediately pay the rent, but the defendant would not accept the same. On February tenth the treasurer tendered the rent for the quarter, and on the fourteenth he tendered the rent plus the interest from the eighteenth of January to February fourteenth, and from that time to this tenders have been kept alive; a bond for \$27,000 has been given and the rents as they accrued have been deposited, so that the defendant could, if it wished, obtain them.

Thereafter the defendant brought dispossess proceedings against the plaintiffs as holdovers after the termination of their lease, but the tenants had a decision in their favor which, on appeal to the Appellate Term, was reversed and a new trial ordered. (*Barney Estate Co. v. Palmer & Singer Mfg. Co.*, 68 Misc. Rep. 501.) Before the coming on of the new trial this equitable action was instituted and a preliminary injunction was granted by the Special Term which was affirmed unanimously on appeal to this court, without opinion. (143 App. Div. 906.)

In the agreed statement of facts submitted to the Special Term it is conceded that the rental value of the premises since January 1, 1910, is substantially more than the amount of rent reserved in the lease.

As conclusions of law the Special Term found that the defendant waived the payment of rent for the quarter beginning January 18, 1910, on the particular day specified in the lease, and that plaintiffs are entitled to judgment as asked for excusing plaintiffs for not paying the rent upon the rent day mentioned, and that the said lease is in full force and effect and binding upon the parties hereto in all respects, and plaintiffs were entitled to the injunction prayed for, and from the judgment entered in accordance therewith defendant appeals.

It is apparent from the record that there is and has not been the slightest chance that defendant would fail to receive the full amount of rent due. It has been tendered repeatedly and is thoroughly secured by bond and deposit, and the question is whether a court of equity is required to declare a forfeiture of a long term lease for a twenty-one days' delay in the payment of the quarterly rent payable in advance under the circumstances disclosed by this record. The plaintiffs are engaged in

App. Div.] First Department, February, 1912.

the automobile business and it is suggested that the month of January is a dull time in said business; that in the previous year the rent for the quarter due on January 18, 1909, was not paid until February 18, 1909, a full month after the due day, and was then received without any suggestion of a forfeiture of the lease.

A significant fact is that in the conversation over the telephone between the vice-president of the defendant and the president of the plaintiff companies, held on the first, second or third of February, as Mr. Brundage testified, when he said that he would like a check Mr. Singer said it would be sent and he further testified that nothing was said about canceling the lease or "to indicate that because the rent had not been paid two or three weeks before that we would not take the rent. We were willing to take the rent at that time." Yet six days later the notice was served canceling the lease for default in payment on January eighteenth. Can it be doubted for a moment that if Mr. Brundage had said to Mr. Singer, if you don't send the check at once we will be obliged to exercise the option given to us by the lease and cancel it, he would have received it, it appearing that immediately upon receipt of the notice of February ninth the full amount due with interest was tendered?

In view of the previous relations of the parties and their mutual conduct, it was not fair without notice to attempt to exercise the right to cancel. Forfeitures are not favored in equity. This provision was inserted by way of security but is being made use of, not to enforce payment of an amount due, but to regain possession of a valuable piece of property of which the rental value has substantially increased since the making of the lease above the amount of the rent reserved.

In *Horton v. N. Y. C. & H. R. R. Co.* (12 Abb. N. C. 30; affd. without opinion, 102 N. Y. 697), where a similar action was brought to secure relief to the plaintiffs from the forfeiture of a term, Mr. Justice DANIELS said: "Under the well-settled principles observed and enforced in courts of equity where such a forfeiture has been provided for as a security to the lessors for the payment of the rent reserved, as it was by this lease, the tenants have usually been relieved from the

consequences of their fault when a speedy application has been made for that purpose. The right to forfeit the tenants' term has been justly regarded as in the nature of a security provided by the terms of the lease to the lessors for the payment of the rent, and for that reason full effect can be given to it by allowing the tenants to pay the rent in arrear with interest in the meantime accruing upon it. (1 Story Eq. Jur. [12th ed.] § 187.) By the proof given upon the trial, it was also made to appear that indulgence was extended to the lessees in the payment of the rent reserved by the lease. And while this did not strictly relieve them of the obligation to perform their covenant, it still constituted an excuse for the omission to pay the rent at the time when it matured. * * * After the tenants had been in this manner lured into negligence, it would be a fraud upon them to permit the lessors or their grantee to insist upon the forfeiture."

In *Giles v. Austin* (62 N. Y. 486) there was a covenant in the lease that the lessee should pay the taxes and assessments as the same should become due and payable. After notice the lessor brought an action of ejectment alleging that the lessee had neglected and refused to pay the taxes for a number of years. After the action in ejectment had been instituted plaintiff brought an action to be relieved from his forfeiture. Judge RAPALLO said: "That covenants to pay taxes and assessments are in the nature of covenants to pay money, and that forfeitures incurred by their breach may be relieved against upon the same principles. By the payment of the amount due at any time before sale or the expiration of the right to redeem, the landlord is placed in precisely the same position as if no default had occurred; and where there is no bad faith on the part of the tenant, mere delay in making the stipulated payments should not bar him from relief."

In *Noyes v. Anderson* (124 N. Y. 175) BRADLEY, J., said: "The power of a court of equity in cases properly requiring it, will be exercised to relieve a party against forfeitures and from penalties. And this is upon the principle of equity jurisprudence that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression. * * * It is also not only available

App. Div.] First Department, February, 1912.

to cases of leases where forfeiture of the term and entry are provided for as the consequences of non-payment of rent on the day it becomes due, but is extended to other cases, and more especially to those (although not necessarily confined to them) where the default resulting in forfeiture is in payment of money, as in such case adequate compensation can be made. (Pomeroy Eq. Jur. §§ 433, 450, 451.)"

The judgment appealed from should be affirmed, with costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and SCOTT, JJ., concurred.

Judgment affirmed, with costs.

ROBERT J. COLLIER, Respondent, *v.* POSTUM CEREAL COMPANY, LIMITED, Appellant.

First Department, February 16, 1912.

Libel and slander — evidence — testimony not relevant to issues — innuendo.

In an action for libel based upon a publication by the defendant stating that previous publications by the plaintiff criticizing a food product manufactured by the defendant were "mendacious falsehoods" and designed to compel the defendant to advertise in the plaintiff's publication, it is error to allow the plaintiff to put in evidence advertisements of the defendant and to give expert testimony showing that claims made by the defendant on behalf of its product were false, where such evidence is wholly unrelated to the alleged libelous publication of the defendant.

The evidence cannot be justified upon the ground that the issue was tendered by an innuendo in the defendant's answer, for the meaning of an article cannot be enlarged by innuendo.

Parties to an action for libel cannot give evidence attacking each other generally regardless of the issues involved.

LAUGHLIN and DOWLING, JJ., dissented, with opinion.

APPEAL by the defendant, the Postum Cereal Company, Limited, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of December, 1910, upon the verdict of a jury for \$50,000, and also from an order entered in said clerk's office on the same day, as amended *nunc pro tunc*

First Department, February, 1912.[Vol. 149.]

by an order entered on the 19th day of December, 1910, denying the defendant's motion for a new trial made upon the minutes.

James A. O'Gorman [Arthur B. Williams and Stephen P. Anderton with him on the brief], for the appellant.

Morgan J. O'Brien [James W. Osborne and Edwin W. Willcox with him on the brief], for the respondent.

MILLER, J.:

The provoking article published by *Collier's* did not, as is said, make a general charge of fraudulent and deceptive advertising against the defendant. The charge was that the defendant by its methods of advertising was to its own injury causing its food products to be classed in the public mind with fraudulent and failing patent medicines. The specific charge was as follows:

"One widely circulated paragraph labors to produce the impression that 'Grape-Nuts' will obviate the necessity of an operation in appendicitis. This is lying, and, potentially, deadly lying. Similarly, 'Postum' continually makes reference to the endorsements of 'a distinguished physician' or 'a prominent health official,' persons as mythical, doubtless, as they are mysterious."

In the retort, which is the basis of this suit for libel, the defendant quoted these specific statements, characterized them as "mendacious falsehoods," and in substance charged that they were published to force the defendant to advertise in *Collier's* on its own terms. To meet the defendant's plea of privilege the plaintiff assumed the burden of proving the falsity of the alleged libelous article and actual malice in its publication. That involved proof of the truth of the said specific statements, which naturally would consist of evidence of advertisements calculated or tending to create the impression that Grape-Nuts would obviate the necessity of an operation in appendicitis, of the falsity of such a claim, if made, and of the publication of fictitious endorsements purporting to have been made by physicians and health officials. I am unable to find in the voluminous record before us any evidence whatever of the publication

App. Div.] First Department, February, 1912.

by the defendant of such fictitious indorsements, and to say the least, it is open to argument whether any of the defendant's advertisements could fairly be construed as making a claim that Grape-Nuts would cure appendicitis. For the obvious purpose of bridging over the weakness of the plaintiff's case on that head the learned trial counsel attempted, and ultimately succeeded in the attempt, to make a general attack upon the defendant, its products "Postum" and "Grape-Nuts" and its methods of advertising them. Indeed, to read this record without reference to the pleadings, one would think that the parties had changed places and that the plaintiff as defendant was attempting to justify a general charge of dishonesty made against a plaintiff. It will serve no useful purpose to go into details. Suffice it to say that the plaintiff was permitted to put in evidence any advertisement of the defendant, the packages in which the defendant's products were put up, and the printed matter thereon, or distributed therein, and to call experts, physiological chemists, dieticians and physicians, to prove that claims made by the defendant on behalf of its products, but wholly unrelated to the said specific statements, were false, *e. g.*, that the statement on the Grape-Nuts packages, "A Food for Brain and Nerve Centers," was untrue. It is impossible to estimate the effect upon the jury of the clever use made by ingenious counsel of a mass of that kind of evidence and of the array of distinguished chemists, employed in agricultural departments of different States and of the United States in the enforcement of pure food laws, who had had occasion to analyze Postum and Grape-Nuts. An attempt is made to justify the course of the trial on the ground that the defendant tendered the issue by an innuendo in the answer. The meaning of an article cannot be enlarged by innuendo. Timely objection was taken by the appellant and insisted upon throughout the trial. The error was fundamental and permeated the whole case, and it seems to me that we cannot sustain this judgment without virtually holding that, in a libel case, either party is at liberty to attack the other wholly regardless of the issues in the case.

The judgment and order appealed from should, therefore,

APP. DIV.—VOL. CXLIX. 10

First Department, February, 1912.

[Vol. 149.]

be reversed and a new trial ordered, with costs to appellant to abide event.

INGRAHAM, P. J., and SCOTT, J., concurred; LAUGHLIN and DOWLING, JJ., dissented.

INGRAHAM, P. J. (concurring):

The discussion of this case by Mr. Justice LAUGHLIN points out various rulings upon questions of evidence, exceptions taken to the charge as made, and refusals to charge, which I think are erroneous, and an examination of the record discloses that in consequence of the rulings of the learned trial judge both in regard to evidence and passing upon the defendant's requests to charge, the case was not presented to the jury in such a way as to preserve the rights of the defendant.

I also concur with Mr. Justice MILLER and, therefore, vote for a new trial.

LAUGHLIN, J. (dissenting):

The action is for libel. At the time of the publication of the alleged libel and for years prior thereto the plaintiff and his father, Peter F. Collier, since deceased, owned and published a weekly periodical known as *Collier's Weekly*, of which plaintiff was the managing editor. The plaintiff determined the policy of *Collier's* and had and exercised general supervision over it, but the editorials published therein were written by others, and Norman Hapgood, who was the chief editorial writer, was known as "Editor" by those connected with the paper, and on one occasion when a picture of the staff was published in *Collier's* the word "Editor" was printed under Hapgood's name. In the complaint it is charged that the libel was of and concerning the plaintiff as one of the *owners* and one of the *editors* of *Collier's Weekly*, and was composed and published "with the intent to injure this plaintiff and the newspaper 'Collier's Weekly,' of which the plaintiff is one of the owners and editors, in his and its good name and reputation." The alleged libel was published on the 4th day of September, 1907, in answer in part, at least, to an editorial published in *Collier's Weekly* on the 27th day of July, 1907, which it is claimed made both the *occasion* and the *article* privileged. It is alleged in the complaint and admitted by the answer that the defendant

App. Div.] First Department, February, 1912.

is a copartnership association organized and existing under the laws of the State of Michigan, and engaged in the business of manufacturing and selling food products, and among others, "Grape-Nuts," a food, and "Postum," a beverage. For several years prior to December 23, 1904, the defendant had advertised Grape-Nuts and Postum in *Collier's* for which it paid about \$9,000 per annum, and on that day, through the Grandin Advertising Agency, Ltd., it entered into a contract for advertising said products in *Collier's* for the year commencing February 25, 1905. The contract contained no express restriction with respect to the contents of the advertisements, but it provided, among other things, that they should be inserted to the right of reading matter, and at "bottom of column" and "set in body type of paper, * * * leaded if reading on same page is leaded, to conform as near as possible to size of type as shown on copy." Prior to the 4th of November, 1905, Samuel Hopkins Adams had written a series of articles entitled "The Great American Fraud," attacking patent medicine advertising as an imposition on the public, and they were published from time to time under his name, in *Collier's*. The issue of *Collier's Weekly* published on said fourth day of November contained an editorial with the heading "Editorial Bulletin," in which reference was made to the articles written by Mr. Adams and published in *Collier's*, and after charging and pointing out at length the writer's basis for the charge, that the advertisers of patent medicines, owing to the revenue derived from the advertisements, exercised a powerful influence over the press in the dissemination of false claims with respect to the merits of patent medicines, and the suppression of news relating to the injurious and poisonous effects thereof, and stating that *Collier's* had been charged with inconsistency in that, while declining advertisements of certain patent medicines, it accepted advertisements of beer and whisky, it announced that *Collier's* was not engaged in a total abstinence crusade, but merely a crusade "against fraud and poison, against alcohol and drugs masquerading in the innocent guise of 'tonics' and 'headache powders,'" and that, to avoid any further misunderstanding between it and its readers, it had determined to refuse advertisements of beer

First Department, February, 1912.

[Vol. 149.]

and whisky as well as patent medicines in the future, and closed with an announcement as follows: "We have tried to formulate an advertising policy, based on common sense rather than 'holiness' that will protect our readers from being imposed upon. That policy is briefly as follows:

" *Collier's* will accept no advertisements of beer, whisky, or alcoholic liquors; no advertisements of patent medicines; no medical advertisements or advertisements making claims to medicinal effect; no investment advertising promising extraordinary returns, such as stocks in mining, oil, and rubber companies. The editor reserves the right to exclude any advertisement which he considers extravagant in claim or offensive to good taste."

The lower right-hand corner of the page on which this announcement was made contained an advertisement of Postum headed in large heavy type "Funny!" with a hand pointing to that word, and with the further heading on the line below "People Will Drink Coffee When It 'Does Such Things,'" and the body of the advertisement was as follows :

" 'I began to use Postum because the old kind of coffee has so poisoned my whole system that I was on the point of breaking down, and the doctor warned me that I must quit it.

" 'My chief ailment was nervousness and heart trouble.

" 'Any unexpected noise would cause me the most painful palpitation, make me faint and weak.

" 'I had heard of Postum and began to drink it when I left off the old coffee. It began to help me just as soon as the old effects of the other kind of coffee passed away. It did not stimulate me for a while, and then leave me weak and nervous as coffee used to do. Instead of that it built up my strength and supplied a constant vigor to my system which I can always rely on. It enables me to do the biggest kind of a day's work without getting tired. All the heart trouble, etc., has passed away.

" 'I give it freely to all my children, from the youngest to the oldest, and it keeps them all healthy and hearty.'

" Name given by Postum Co., Battle Creek, Mich.

" There's a reason.

" Read the little book, 'The Road to Wellville,' in pkgs."

App. Div.] First Department, February, 1912.

The page containing the editorial announcement and this advertisement was cut out, evidently by a reader, and sent to *Collier's* by mail, with a notation thereon reading as follows: "Consistency thou art a jewel," On the 22d day of November, 1905, Mr. Nast, *Collier's* advertising manager, wrote the agency through which the contract with *Collier's* was made and Mr. Post, who virtually owned the defendant and who was chairman of its board of managers and exercised entire control over it and prepared its advertising matter, and drew attention to said advertising policy then recently adopted by *Collier's*, a copy of which was inclosed, and stated that *Collier's* would not in the future publish "the style of copy" defendant had been sending for Postum and Grape-Nuts, and suggested "that regular display copy" might be so written that it could be inserted without violating *Collier's* policy and still prove of great value to defendant, and further stated: "I do not question the value of Postum and Grape-Nuts, but I feel that insertion of advertising along the lines of your former copy would be in violation of our advertising policy." Post replied under date of November twenty-ninth, denying that defendant's advertisements claimed any medicinal ingredients or effects for Grape-Nuts and Postum, and stating that he claimed merely that coffee is injurious and that people injured by it could be helped by using a food-coffee, and that people used food not suited to their requirements, and "that by changing their food and using well selected natural food like Grape-Nuts, they can be physically and mentally improved;" and further stating, in effect, that if *Collier's* did not see fit to accept defendant's advertising they were at liberty to discontinue publishing it, but protested against being classed with patent medicine advertisers. On December sixth Nast replied as follows:

"I have your letter of November 29, and agree with you that Postum and Grape-Nuts should never, for one moment, be classed as patent medicines, nor have I done so.

"During our present campaign against patent medicines, however, it is not possible for us to publish, in any advertisement, symptoms of heart trouble, stomach troubles, and nervous diseases, which are clearly subject for the family physician's attention.

First Department, February, 1912.

[Vol. 149.]

"I do not object to Postum Cereal as a substitute for coffee, nor do I state that your present advertising makes claims of medicinal *ingredients*; but what conflicts with our advertising policy is, that the advertising makes claims of medicinal effects."

"We have no doubt whatever that Postum and Grape-Nuts are doing a great deal of good; but in view of our present campaign against patent medicines, it is impossible for us to allow their promotion through our columns in the style of copy we have been inserting."

Post replied on December eleventh, stating that it might be correct if it had been stated that defendant made claims that Grape-Nuts and Postum produced "physical and mental effects;" but that it was not correct to charge that it claimed "medicinal effects," and gave his reasons for claiming that these products produced beneficial mental and physical effects, and objected to having the work he was doing in introducing these natural foods to the public classed with the work which *Collier's* was making a crusade against. Nast again replied on December eighteenth, reiterating his position and pointing out that Postum and Grape-Nuts could be advertised "without giving a list of symptoms which may be obviated by the use of the two foods;" and that the symptoms incorporated in defendant's advertising "come in the field of the physician's work, and should not, therefore, appear in type in conjunction with a food, any more than with a patent medicine," and stating that *Collier's* could not during its campaign against patent medicines insert the style of copy which defendant had been furnishing, and closed with the following:

"I dislike very much to lose the Postum and Grape-Nuts advertising; and hope you may be able to see my difficulty and submit copy written on general publicity lines, which would overcome it, and, at the same time, prove a valuable investment for you."

On the twenty-sixth of December *Collier's* returned advertising copy received from the advertising agency on December twentieth, and from that time, without further negotiations, both parties apparently acquiesced in the abandonment of the advertising contract. The editorial published in *Collier's*

App. Div.] First Department, February, 1912.

July 27, 1907, with reference to which the alleged libelous article was written was as follows:

"*Deception There Is*, in advertising, as in all dealings between the imperfect human animal and his equally imperfect fellow. It is lessening with the spread of intelligence. Some, that is still conspicuous in print, is unnecessary, and hence incredibly stupid. For example, take certain recent exploitations of 'Grape-Nuts' and its fellow article 'Postum,' put out by the same concern. One widely circulated paragraph labors to produce the impression that 'Grape-Nuts' will obviate the necessity of an operation in appendicitis. This is lying, and, potentially, deadly lying. Similarly, 'Postum' continually makes reference to the endorsements of 'a distinguished physician' or 'a prominent health official,' persons as mythical, doubtless, as they are mysterious. Here are two articles of food which unless there is some secret *Futility* reason against it should sell on their merits. Yet their manufacturer persists in insulting the intelligence and alienating the support of people who might otherwise purchase them. 'I've stopped taking Grape-Nuts since it became a patent medicine,' said an acquaintance of ours recently. The editor of a prominent religious journal writing of the cancellation of certain patent-medicine contracts, says: 'I have sometimes the same feeling toward the Postum advertisements, and those of Grape-Nuts. * * * The manner in which they are pushed and the phraseology used to commend them, constantly cause me annoyance.' If these breakfast foods desire to be classed in the public mind with the *fraudulent and failing patent medicines*, they are taking the proper steps to that end. But isn't it worth their while to stop and consider whether, in the long run, it will pay to identify themselves with a class of merchandise which has no other selling power, save only that which it derives, at an enormous outlay and an increasing risk, from *mendacious claims?*"

At that time Mr. Post was in Paris. He received a copy about the middle of August, and according to his testimony, after reading the editorial, he immediately wrote and mailed to the defendant for publication the alleged libelous article as follows:

“THE ‘YELL-OH’ MAN AND ONE OF HIS WAYS.

“To call a man a liar seems rude, so we will let the reader select his own term.

“Some time ago the manager of ‘Collier’s Weekly’ got very cross with us because we would not continue to advertise in his paper.

“We have occasionally been attacked by editors who have tried to force us to advertise in their papers at their own prices, and on their own conditions, failing in which we were to be attacked through their editorial columns. The reader can fit a name to that tribe.

“We had understood that the editor of *Collier’s* was a wild-cat of the Sinclair ‘jungle-bungle’ type, a person with curdled gray matter, but it seems strange that the owners would descend to using their editorial columns, yellow as they are, for such rank out-and-out falsehoods as appear in their issue of July 27, where the editor goes out of his way to attack us, and the reason will appear tolerably clear to any reader who understands the venom behind it.

“We quote in part as follows: ‘One widely circulated paragraph labors to induce the impression that Grape-Nuts will obviate the necessity of an operation in appendicitis. This is lying, and potentially, deadly lying. Similarly, Postum continually makes reference to the indorsements of ‘a distinguished physician’ or ‘a prominent health official,’ persons as mythical, doubtless, as they are mysterious.’

“We do not hesitate to reproduce these mendacious falsehoods in order that it may be made clear to the public what the facts are, and to nail the liar up so that people may have a look at him. If this poor clown knew what produced appendicitis, he might have some knowledge of why the use of Grape-Nuts would prevent it. Let it be understood that appendicitis results from long continued disturbance in the intestines, caused primarily by undigested food and chiefly by undigested starchy food, such as white bread, potatoes, rice, partly cooked cereals and such. These lie in the warmth and moisture of the bowels in an undigested state, and decay, generating gases and irritating the mucous surfaces until under such condi-

App. Div.]First Department, February, 1912.

tions, the lower part of the colon and the appendix become involved. Disease sets up, and frequently of a form known as appendicitis.

"Now then, Grape-Nuts food was made by Mr. C. W. Post, after he had an attack of appendicitis, and required some food in which the starch was predigested. No such food existed; from his knowledge of diatetics he perfected the food; made it primarily for his own use, and afterward introduced it to the public. In this food the starch is transformed by moisture and long-time cooking into a form of sugar, which is easily digested and does not decay in the intestines. It is a practical certainty that when a man has approaching symptoms of appendicitis the attack can be avoided by discontinuing all food except Grape-Nuts and by properly washing out the intestines. Most physicians are now acquainted with the fact and will verify the statement.

"Of course this is all news, and should be an education to the person who writes the editorials for 'Collier's' and who should take at least some training before he undertakes to write for the public.

"Now as to the references to 'a distinguished physician' or 'a prominent health official' being mythical persons. We are here to wager 'Collier's Weekly,' or any other sceptic or liar any amount of money they care to name, and which they will cover, that we will produce proof to any board of investigators that we have never yet published an advertisement announcing the opinion of a prominent physician or health official on Postum or Grape-Nuts when we did not have the actual letter in our possession. It can be easily understood that many prominent physicians dislike to have their names made public in reference to any article whatsoever; they have their own reasons, and we respect those reasons, but we never make mention of endorsements unless we have the actual indorsement, and that statement we will back with any amount of money called for.

"When a journal wilfully prostitutes its columns, to try and harm a reputable manufacturer in an effort to force him to advertise, it is time the public knew the facts. The owner or editor of *Collier's Weekly* cannot force money from us by such methods.

"POSTUM CEREAL CO., LTD."

First Department, February, 1912.

[Vol. 149.]

On receipt of this article by defendant it immediately, pursuant to instructions received from Post, caused the same to be published throughout the country and in forty-four newspapers in this State, eleven of which are in the county of New York.

The history of the case down to the publication of the alleged libel presents other facts which have received due consideration. Those deemed most material and controlling have been set forth, and the substance of the others has been sufficiently stated for the purposes of deciding the questions presented on the appeal.

It is contended by the learned counsel for the appellant that the motion to dismiss the complaint should have been granted, and that, if there was a question for the jury the verdict is against the weight of the evidence. It is claimed that it was not shown that the plaintiff was the editor of *Collier's* to whom the alleged libelous article referred; that both the occasion and the article published by appellant were privileged, and that, therefore, it was incumbent on plaintiff to show both the falsity of the article and actual malice; and that he failed to give evidence of actual malice sufficient to take the case to the jury. It is not now contended, although the claim was made on the trial, that respondent failed to present evidence for the consideration of the jury on the question of falsity. Certain exceptions to the charge may be appropriately considered in this connection. Counsel for appellant requested the court to charge that plaintiff had failed to show that he was the editor referred to in the article, and that he was not entitled to recover any damage for injury to *Collier's Weekly* and excepted to the refusal to charge as requested. It is to be borne in mind that the alleged libel published by the defendant does not specify any particular editor. It cannot be held as matter of law, I think, that it refers only to the editor who wrote the article which it is claimed provoked the reply. The plaintiff was the managing editor and as such was responsible for all editorials published in *Collier's* and would be liable personally and to criminal prosecution for a libel published therein. (Penal Code, § 246; Penal Law, § 1344.) It was for the jury to determine whether readers of average intelligence would understand that the

App. Div.]

First Department, February, 1912.

reference was to plaintiff. Moreover, on the theory on which the case was tried and submitted to the jury it is highly improbable that there has been a recovery for any damages to the plaintiff as an editorial writer. Plaintiff has recovered on account of his connection with and interest in *Collier's Weekly* as part owner and managing editor and the injury to him in his reputation and business. He offered no evidence tending to show that he was an editorial writer or was injured in that capacity. It is contended in behalf of the respondent that he has not recovered for any injury to *Collier's*, and that the recovery has been limited to general damages sustained by him individually; but I think the record does not sustain that proposition. Plaintiff in his pleading complains both of damages to him individually and to *Collier's Weekly*, and in the instructions of the court to the jury attention was drawn to the fact that plaintiff was one of the owners as well as one of the editors of *Collier's* and that he claimed that the libelous words were false "and were composed and published by the defendant with the intent to injure this plaintiff and the newspaper 'Collier's Weekly,' of which the plaintiff is one of the owners and editors, in his and its good name and reputation;" and claimed to be damaged "by reason of the premises" in the sum of \$250,000: The court further instructed the jury that if the article charged plaintiff with having prostituted the columns of *Collier's Weekly* "to try and harm a reputable manufacturer in an effort to force him to advertise therein, then such charge affected the plaintiff in his business and was libelous *per se*; and the publication of an article libelous *per se* is presumed in law to be false and malicious, and, unless the defendant has established a legal excuse, the plaintiff is entitled to recover a verdict without allegation or proof of special damage, because the falsity of the words and resulting damage are presumed." The court also charged that if the jury found for plaintiff he was entitled to recover for the injury to his feelings and reputation. The instructions with respect to exemplary damages were proper but are not in point here. The record contains the opening addresses of counsel for the respective parties but not their arguments to the jury. There is nothing in these addresses to indicate that plaintiff

First Department, February, 1912.

[Vol. 149.]

limited the claim made in his complaint, or did not seek to recover the damages which he sustained as part owner of *Collier's Weekly*. From the allegations of the complaint, the proof of part ownership of *Collier's* by plaintiff, and the charge delivered by the court, the jury may well have understood that the plaintiff was entitled to recover, not merely the damages which he sustained individually, but those which he sustained as part owner of *Collier's*, as well. If the question were without precedent, I would hesitate before holding that separate recoveries may be had by the individual members of a copartnership of the damages which they sustain as copartners, and would stop to inquire whether that might not in some instances prejudice the rights of the creditors of the firm, or the rights of copartners who had furnished the capital, or who would on dissolution be entitled to a greater share in the surplus than the proportionate share specified in the articles of copartnership; but the rule appears to be well settled and sustained by decisions and text-book writers, which have been followed by a recent decision in this court, that damages caused by a libel on the copartnership business may be recovered in a joint action by all of the members of the firm, or that any partner may, in an individual action, recover the damages he sustains both in his individual capacity and as a member of the firm. (*Tobin v. Best Co.*, 120 App. Div. 387; *Rosenwald v. Hammerstein*, 12 Daly, 377; *Constitution Pub. Co. v. Way*, 94 Ga. 120; *Wills v. Jones*, 13 App. Cas. [D. C.] 482; *Noonan v. Orton*, 32 Wis. 106; 18 Am. & Eng. Ency. of Law [2d ed.], 1055; 25 Cyc. 426.) If the members of a firm bring an action to recover damages for an article which is libelous *per se* as against the firm, they may recover general damages for the probable injury to their business without proof of any damages, for the damages are presumed; but they cannot recover for any injury sustained by the members of the firm in their individual capacities. (*Taylor v. Church*, 1 E. D. Smith, 279; affd. on this point, 8 N. Y. 452; *Havemeyer v. Fuller*, 10 Abb. N. C. 9; *Ludwig & One v. Cramer*, 53 Wis. 193; *Harrison v. Bevington*, 30 Eng. C. L. 975; 25 Cyc. 426.) In this respect, the rule is somewhat similar to that by which a corporation is entitled to recover for a libel constituting an attack on its busi-

App. Div.] First Department, February, 1912.

ness methods, and the officers of the corporation may recover individually for the damages which they have sustained by the same libel. (*Reporters' Assn. v. Sun Printing & Pub. Assn.*, 186 N. Y. 437; *Town Topics Pub. Co. v. Collier*, 114 App. Div. 191; *Kemble & Mills v. Kaighn*, 131 id. 63; *Mutual Reserve Fund Life Assn. v. Spectator Co.*, 50 N. Y. Super. Ct. 460; *Arrow Steamship Co. v. Bennett*, 73 Hun, 81; *Union Associated Press v. Heath*, 49 App. Div. 247.) Counsel for the appellant contends that in so far as the article libeled *Collier's* it constituted a libel on a *place or thing*, as distinguished from the firm or its business, within the rule on that subject stated in numerous decisions. (See *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 390; *Maglio v. New York Herald Co.*, 83 App. Div. 44; 93 id. 546; *Kennedy v. Press Pub. Co.*, 41 Hun, 422; *Le Massena v. Storm*, 62 App. Div. 150; *Bosi v. N. Y. Herald Co.*, 33 Misc. Rep. 622; affd., 58 App. Div. 619, which hold that in such case there can be no recovery without proof of special damages; and there being no proof of special damages here, it is claimed that it was error in any event, to decline this request to charge.) I am of opinion that the libel on this weekly periodical, known as *Collier's* was a libel, not upon a *place or thing*, but against the business methods under which *Collier's* was conducted; and since plaintiff was entitled to recover all of his damages in one action, he could recover for the injury he sustained as a part owner of *Collier's*. The jury, therefore, had a right, without other proof of such damages, than is presumed by the libel, to assess them as if the action were brought by the firm; but plaintiff's right to recover in this regard was, of course, confined to his interest in the firm, which was shown. I do not say that the jury have awarded damages on account of plaintiff's interest in the firm, but from the manner in which the case was presented to them it cannot be said that they have not, and still, for the reasons assigned, I think there was no error. The editorial published in *Collier's* constituted an attack on defendant's business methods and, therefore, afforded a privileged occasion presumptively preventing the inference of malice which would otherwise arise from the publication of a defamatory article, and the court so charged. The business

First Department, February, 1912.

[Vol. 149.]

and business methods of the defendant having been attacked, it had a right to defend itself, and in publishing its defense it was protected by a qualified privilege to do so in a manner calculated to reach and convince the readers and those who would become aware of the attack made upon it by the editorial in *Collier's* that the charges were false and groundless, and its defense, even though mistaken or false, if germane to the charge and made without actual malice, and not too vindictive or too violent or in language too denunciating or unnecessarily defamatory, was privileged, and no liability could be predicated thereon (*Ashcroft v. Hammond*, 197 N. Y. 488; *Sunderlin v. Bradstreet*, 46 id. 188; *Klinck v. Colby*, Id. 427; *Moore v. Mfrs. Nat. Bank*, 123 id. 425, 426); and the burden in such case would be on the plaintiff to show both falsity and actual malice to entitle him to recover. (*Van Wyck v. Aspinwall*, 17 N. Y. 190, 193; *Hemmens v. Nelson*, 138 id. 517, 523; *Coloney v. Farrow*, 5 App. Div. 607; *Haft v. First Nat. Bank*, 19 id. 425; *Koenig v. Richter*, 3 T. & F. 413.) The privilege, however, is confined to *legitimate self defense*, fairly arising out of the charge constituting the attack, and it does not extend to an unfair defense or to matters irrelevant thereto, and it does not warrant a defamatory attack upon the motives of the author or those responsible for the publication of the provocative article, for that would not be germane to a proper defense, which would ordinarily be confined to a denial and to an assertion of what was claimed to be the truth with respect to the subject-matter of the attack and a statement of the facts and anything tending to sustain them (*Klinck v. Colby*, *supra*; *Tuson v. Evans*, 12 Ad. & El. 733; *Cassidy v. Brooklyn Daily Eagle*, 46 N. Y. St. Repr. 334; revd. on another point, 138 N. Y. 239; 28 Court of Appeals Cases & Points, No. 208 [1893]; Odgers on Libel & Slander [5th ed.], 292 and note p. 294; *Ashcroft v. Hammond*, *supra*); and, moreover, the retort must be sufficiently proximate in time to afford the privilege which is accorded largely on the theory that the retort and defense in such case are usually uttered or published on the impulse and in the heat of passion, on receiving information of the attack, and are immediately provoked thereby. (*Keller v. American Bottlers' Pub. Co.*, 140 App. Div. 311; *Lee*

App. Div.]

First Department, February, 1912.

v. *Woolsey*, 19 Johns. 319; *Willover v. Hill*, 72 N. Y. 36; *Maynard v. Beardsley*, 7 Wend. 560; *Gould v. Weed*, 12 id. 12.) Where a publication is qualifiedly privileged, malice may not be inferred from mere falsity of the charge (*Klinck v. Colby, supra*; *Coloney v. Farrow, supra*), but it may be inferred from knowledge of the falsity of the charge, or disbelief therein, or lack of reasonable ground for belief in its truth, and the tenor of the article, as where the language used is unnecessarily violent or denunciatory. (*Klinck v. Colby, supra*; *Ashcroft v. Hammond, supra*; *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. [1871-1873] 495, 505.) The test is not merely whether the occasion is privileged, for the occasion may afford a privilege and part of the article be privileged and part defamatory and libelous. (*Moore v. Mfrs. Nat. Bank, supra*.) The rule is that the burden is on the defendant of pleading and proving privilege, and that where part of an article is privileged and part is not, it should not be construed strictly in determining what is and what is not privileged (*Stevenson v. Ward*, 48 App. Div. 291; *Stuart v. Press Publishing Co.*, 83 id. 467, 474); but this rule of liberality in construing the article does not extend to a charge made against a third party on an occasion privileged with respect to another, but not as to him. (*Moore v. Mfrs. Nat. Bank, supra*.) The rulings upon the trial were for the most part very favorable to appellant. The court did not rule that any part of the article was libelous *per se*, or was not privileged, or that the presumption that it was privileged had been overcome, and left all of these questions to the jury on the theory that they depended on determinations of fact on conflicting evidence with proper instructions, however, as to the law with respect to particular findings of fact. If the article was not privileged, it was clearly libelous *per se*, for it charged *Collier's* with having attacked defendant because it did not advertise in *Collier's* on the conditions imposed, which was in effect a charge of extortion and it was otherwise libelous *per se* also. It might well be argued on this record that as matter of law Post had no reasonable ground for believing that the motive for the editorial attack was his company's failure to conform to *Collier's* requirements with respect to the form of advertising, and that, even if he so believed, the charge

with respect to the motive in publishing the editorial was libelous *per se* and could only be justified by actual proof, not of his belief concerning the fact, but of the truth of the charge, upon the theory that as a matter of law it was not protected by the qualified privilege. I am of opinion that the court should have ruled as matter of law that the article published by defendant was not privileged with respect to the motive attributed to *Collier's* or that if it was presumptively privileged the evidence overcame the privilege as matter of law; but the defendant was not prejudiced by being given the opportunity of arguing these questions to the jury on the facts. *Collier's* took a dignified, definite, consistent and determined stand with Post with reference to defendant's advertisements; and that controversy had been settled by mutual acquiescence some eighteen months before the editorial was published. The editorial was along the line of policy which led *Collier's* to decline to publish defendant's advertisements in the form presented. The undisputed evidence shows, and it was admitted by one of the attorneys for the defendant, that without additional space or additional charge the defendant could have conformed to the requirements of *Collier's* with respect to display advertising and could have continued to advertise its products in *Collier's*, but, of course, not as effectively for its purpose as in the form in which it had theretofore been advertising, and unquestionably that was its reason for discontinuing advertising in *Collier's*. The respondent also gave evidence tending to show, and sufficient to sustain the determination of the jury in that regard, not only falsity of the article in respect to the motive imputed to *Collier's*, but also that the statements in *Collier's* editorial to the effect that the defendant was guilty of deceptive advertising, and which the alleged libelous article charged were false and that in two respects, at least, were mendacious falsehoods, were true, and, if so, it of course follows that the libelous article was false in these respects also. If the alleged libel was false, the jury were justified in finding on the evidence that its falsity was known to the defendant through Post, who represented it, and it is doubtful whether any findings to the contrary could be sustained on the evidence. The jury were also justified in finding that the alleged libelous article was

App. Div.]

First Department, February, 1912.

published maliciously. The evidence supporting this finding is falsity of the article and knowledge of its falsity and the nature of the charge and the intemperate language in which it is clothed and the wide publicity given thereto, which was not given hastily, as in the case of the preparation of the article by Post, according to his testimony, but after due deliberation, for, having transmitted the article to his company at Battle Creek, Mich., by mail from Paris, with instructions with respect to giving it to the public in the manner in which it was published, he could, had he so desired, for twenty days intervened between the receipt of the editorial by him and the publication of the defense thereto, and he was a man of means, have cabled instructions countermanaging or modifying his instructions by mail; and the other representatives of the company had nearly six weeks within which to consider the editorial before the defense thereto was made.

The appellant predicates error on the reception of evidence which the respondent was permitted to introduce, over objection and exception duly taken that it was immaterial, tending to show that appellant was guilty of deceptive advertising. This evidence related to advertisements published in the press and periodicals within a comparatively short period prior to the editorial published in *Collier's*, to the printed matter on the wrappers in which appellant's products were put on the market for sale, to chemical analysis of defendant's products and the opinions of medical experts, some of whom were connected with the health departments of other States and who had in the performance of their official duties investigated appellant's products, as to whether appellant's products were calculated to produce the effects which appellant by its advertisements represented. The appellant's principal objection to this evidence is made upon the theory that it only characterized the two specific charges in the editorial published in *Collier's*, which were quoted in the libel, as mendacious falsehoods, and that the evidence should have been confined to those. It is not seriously contended by the learned counsel for the appellant, and it could not successfully be contended, that with the burden of proof resting on the respondent of showing

First Department, February, 1912.

[Vol. 149.]

both falsity of the alleged libel and actual malice in its publication it was not relevant to the issues to show the falsity by proving the truth of what it denounced as false. (See *Maynard v. Beardsley*, 7 Wend. 561; *Lee v. Woolsey*, 19 Johns. 319.) It is manifest, therefore, that the real questions are what part of the editorial did defendant charge to be false and whether the evidence received tended to show the falsity of the appellant's publication or malice on its part. I am of opinion that the editorial published in *Collier's* charged the appellant with deceptive advertising. The subject of the editorial was deceptive advertising. The first sentence charges generally that there is deception in advertising. The second sentence states that deceptive advertising is lessening, and the third states that "Some," plainly meaning deceptive advertising, is stupid. The fourth then cites as examples of stupid deceptive advertising recent exploitations of Grape-Nuts and Postum. This is a general charge and the following sentences refer more specifically to some of the recent exploitations of these products as illustrations of those embraced in the general charge. The fair construction of the alleged libel is that it denounced as "out and out falsehoods" the entire editorial so far as it related to it and as "mendacious falsehoods" the two more specific charges, and this is the construction it has placed on it by its answer. In that view any evidence of recent deceptive advertising was admissible; and more than a single instance would be required to sustain *Collier's* charge and thus disprove defendant's charge contained in the alleged libel. (Townsh. Sland. & Lib. 319; *Sterling v. Sherwood*, 20 Johns. 204; *Stilwell v. Barter*, 19 Wend. 487; *Osterheld v. Star Co.*, 146 App. Div. 388; *Lanpher v. Clark*, 149 N. Y. 472.) The trial court, however, did not construe the alleged libel thus broadly and repeatedly made general rulings showing an intention to confine the evidence with respect to advertisements relating to the two charges quoted in the libel with respect to appendicitis, and to testimonials. In some instances it appears that counsel for respondent failed to keep within the general rulings of the court and introduced evidence which under such rulings would doubtless have been stricken out had a motion to that effect been made. The principal evidence

App. Div.] First Department, February, 1912.

presented in behalf of respondent of which complaint is made, tended to show *both* that appellant *advertised* that appendicitis could be avoided or averted by the use of Grape-Nuts, *and that this was not true*. That evidence not only tended to show that appellant was guilty of deceptive advertising, but it bore directly on the specific charge which appellant characterized as "mendacious falsehoods" that one widely circulated paragraph of deceptive advertising by appellant labored to produce the impression that the use of Grape-Nuts would obviate the necessity of an operation in appendicitis which was the theory on which it was received by the trial court. The respondent introduced in evidence many advertisements of the appellant in the form of testimonials from physicians and others with respect to the beneficial effects of the use of Grape-Nuts and Postum, and showed that the appellant offered prizes for testimonials, but respondent did not offer any other evidence tending to show that such testimonials had not in fact been received. I am of opinion that the nature of these testimonials and the phraseology in which they were written presented a question of fact as to whether some of them were not only solicited by the defendant but prepared in its interests. Were this not so, however, the respondent had a right to show that part of the appellant's article was false, and the mere attempts to show that part of it was false did not oblige the respondent to show that it was false in *toto*. Even on the theory, therefore, on which the case was tried the evidence presented by the respondent, with the exception of some which was not within the general rulings of the court as already stated, was competent and relevant on the issue of falsity and malice and justified the jury in determining that in so far as the article is defamatory the privilege was so abused that it was lost, that the publication was false, that appellant knew it was false, and was actuated by express malice. This evidence was introduced by the respondent on its case in chief, but that was not an admission that the publication was privileged, nor was the fact that the order of proof was not followed prejudicial to the rights of the appellant.

Ordinarily the jury in a libel case may either find for the

First Department, February, 1912.

[Vol. 149.]

defendant or in favor of plaintiff for only nominal damages and they should be so instructed (*Amory v. Vreeland*, 125 App. Div. 850), but here the amount of the verdict shows that appellant would not have been benefited by such a charge if it would have been proper on the facts.

Appellant also asks a reversal on jurisdictional grounds. It claims that it has been brought into court as a copartnership and not as a corporation, and that unless it was an unincorporated association having more than seven members no judgment could be rendered against it, and that even on that theory the action should have been brought against its president or treasurer under section 1919 of the Code of Civil Procedure. It was shown that appellant consisted of only four members. This evidence apparently came out incidentally, for there was no issue with respect to it on the preliminary examination of Mr. Post, who testified that he was chairman, and his brother vice chairman and secretary of defendant, and who the treasurer was, and that all the members "of this partnership association are officers, except my daughter," and that there were four members in 1907. It was alleged in the complaint that the defendant is "a partnership association, duly organized and existing under and by virtue of the laws of the State of Michigan," and this allegation was admitted by the answer. The question was first raised by a motion to dismiss the complaint on this ground made at the close of the plaintiff's case. The learned counsel for the appellant contends that the allegation was not sufficient to show that the defendant was a corporation, and he relies on the case of *Chapman v. Barney* (129 U. S. 677), wherein it was held that the allegation that the defendant company was organized under and by virtue of the laws of the State of New York was not an allegation that it was a corporation. When this question was raised, counsel for the respondent did not ask leave to amend the complaint, but over objection and exception was allowed to introduce certain sections from the Constitution of the State of Michigan and certain statutes of that State and decisions construing them, which show that such a copartnership association has many of the attributes of a corporation and for the purpose of suing and being sued is regarded as a corporation. (Const. Mich.

App. Div.] First Department, February, 1912.

1850, art. 15, § 11; Const. Mich. 1909, art. 12, § 2; Mich. Pub. Acts of 1905, No. 188, amdg. Mich. Comp. Laws of 1897, chap. 160, § 10; *Manhard Hardware Co. v. Rothschild*, 121 Mich. 657; *Rouse, Hazard & Co. v. Detroit*, 111 id. 251; *Sanitus Nut Food Co., Ltd., v. Force Food Co.*, 124 Fed. Rep. 302.) It is not entirely clear that the complaint did not sufficiently allege that the defendant was a corporation, but if it did not, I am of opinion that this evidence was sufficient to overcome the objection. Of course, technically, the complaint, if its allegations are insufficient, should have been amended to conform to the evidence on this point; but since it is manifest that defendant was not taken by surprise by the reception of the evidence and has not been prejudiced, it may, for the purpose of sustaining the judgment, be deemed amended. The cause of action does not depend on whether the defendant is a copartnership or a corporation, and that only becomes material on the point now raised with respect to the form in which the action is to be prosecuted. (*Fox v. Erie Preserving Co.*, 93 N. Y. 54; *Harmon v. Vanderbilt Hotel Co.*, 79 Hun, 392; affd., 143 N. Y. 665; *Rothchild v. Grand Trunk R. Co.*, 10 N. Y. Supp. 37.) Here the action has been prosecuted against defendant in the appropriate form if it be a corporation, but not otherwise, and sufficient facts are alleged to show that plaintiff was proceeding upon the theory that defendant was a corporate entity, and it has acquiesced therein without objection until the making of said motion, and it was then, I think, as contended by the learned counsel for respondent, too late for it to be heard to complain of the admission of the evidence to show that it was a corporate entity. (*Gorton Steamer Co. v. Spofford*, 5 Civ. Proc. Rep. 116.)

Error is predicated on the instructions to the jury contained in the plaintiff's request No. 11, which is as follows: "If the jury should find that the charges contained in the Adams editorial were true that the defendant's advertisement in regard to Grape-Nuts and Postum were deceptive, they must find that the defendant's libel was not a privileged communication."

If the jury found that the charges contained in the editorial were true, it necessarily follows that the defendant's publication, in which it was charged that the editorial was false and

First Department, February, 1912.

[Vol. 148]

contained mendacious falsehoods, was false. It is claimed, however, that it would not necessarily follow that the defendant *knew* that it was false. On the theory that the entire article published by defendant was presumptively privileged, which was adopted on the trial, this charge was not strictly accurate, unless the undisputed evidence shows that if the editorial was true defendant knew or should have known that it was true. If, as charged in the editorial published by *Collier's*, the defendant was guilty of deceptive advertising, it is a reasonable inference that it knew it, for it prepared these food products, and Post personally supervised and directed all of the advertising, and yet it can scarcely be said that there is no conflict in the evidence on that point. If defendant did not know and was not chargeable with knowledge that the editorial was true, then doubtless it could not be said as matter of law that the privilege was destroyed for that would be ruling, in effect, that malice existed as matter of law. If the editorial was true, even though it may not be said as matter of law that defendant knew that it was true and thus that the alleged libel was false, yet, I think, that in publishing the alleged libelous article so long after the controversy over the advertisements and after long deliberation following the publication of the editorial and in view of the vindictiveness of the alleged libel and the criminal motive attributed to *Collier's* and the severe reflection on the periodical and the business methods of its proprietors, it may be held as matter of law that if there was any privilege to answer a truthful charge — a point on which no opinion is now expressed — the alleged libel was not protected thereby and, therefore, the court was justified in ruling that if the editorial was true there was no privilege, for that is equivalent to saying that the privilege if it would otherwise exist was in the circumstances lost. Moreover, the court in the main charge, after submitting it as a question of fact for the jury to determine, under proper instructions, whether the alleged libel was privileged, instructed them that if it was privileged it was incumbent on the plaintiff to show by facts and circumstances that it was false and that its publication was actuated by malice, which could not be implied from the falsity of the publication alone, and that the question was not

App. Div.]

First Department, February, 1912.

whether the publication was true or false, but whether the defendant knew or believed it to be false, and that "defendant may have arrived at conclusions without sufficient evidence, but the privilege protects it upon that ground until the plaintiff has overcome the presumption of good faith by proof of the malicious purpose to defame the plaintiff under cover of the privilege." The court had also unequivocally and unqualifiedly charged that if defendant acted in good faith there could be no recovery in any event. That instruction, with the one complained of, fully protected the rights of the defendant. The court in effect said that if the editorial was true there was no privilege but that plaintiff could not recover if defendant acted in good faith. Thus the jury were informed that both falsity and malice were essential to plaintiff's right to recover. After charging plaintiff's eleventh request, the court further charged, at the request of the defendant, that the burden was on the plaintiff to prove by a fair preponderance of credible evidence that defendant was actuated by actual malice, and that if the statements of fact contained in the alleged libel "were substantially true defendant is entitled to a verdict," and further that as matter of law nothing published by the defendant which was true could injure plaintiff, and that if the jury believed that defendant published the article "in good faith, believing same to be true whether or not the same was actually false, your verdict should be for the defendant," and also that if the defendant's publication was false and it was actuated by actual malice, the jury should still take into consideration "all the facts establishing some relevant portion of defendant's publication in reduction of an amount of damages which would have otherwise been justified in case of a wholly false and reckless publication." The court also instructed the jury that the burden was on plaintiff of showing that defendant had no probable cause for making any statements reflecting on the motive with which the editorial was published in *Collier's*, and that if defendant had probable cause therefor then the verdict must be for the defendant. These instructions given subsequently to charging plaintiff's eleventh request were most favorable to the defendant, and I think they removed any possible prejudice caused by charging the eleventh request.

First Department, February, 1912.[Vol. 149.]

Exception was also taken to the charge that evidence received in mitigation, or tending to show good faith in making the publication, cannot mitigate or lessen the compensatory damages which must be awarded to a person who has been libeled, and that evidence in mitigation was relevant only upon the question of punitive damages. In giving these instructions, the court was stating general principles of law which would not be strictly accurate in all cases, for in some instances evidence in mitigation bears directly upon the actual damages, known as compensatory, as for instance where such evidence, although not a complete justification, tends to show that the conduct or character of the plaintiff was such that his actual damages would not be as great as they might be presumed to be in the absence of such evidence. (*Holmes v. Jones*, 147 N. Y. 59; *Gressman v. Morning Journal Assn.*, 197 id. 474; *Kiff v. Youmans*, 86 id. 324; *Young v. Fox*, 26 App. Div. 261; *Dinkelspiel v. N. Y. Evening Journal Co.*, 91 id. 96; *Osterheld v. Star Co.*, 146 id. 388; *Keller v. American Bottlers' Pub. Co.*, 140 id. 311.) But there was no evidence given in mitigation in the case at bar that had any material bearing upon the question of actual damages. It is claimed that the fact that *Collier's* provoked the libel had such bearing. The editorial was introduced by plaintiff, and I think that the jury would not understand that it was evidence in mitigation. Moreover it is not apparent how plaintiff's compensatory damages are affected by the fact that *Collier's*, acting within its rights, published a fair and honest criticism of defendant's methods of advertising. The court left it to the jury to determine whether the defendant pleaded the truth of the article as a defense in good faith, and if they found that it was not so pleaded they were permitted to consider that in awarding damages. Error cannot be assigned on account of the omission of the court to state in this charge that damages could not be awarded if defendant proved the truth in justification, for the jury were elsewhere in the charge instructed that there could be no recovery if the article was true or even substantially true. It was held *Klinck v. Colby* (*supra*) that, where a communication is privileged, a plea of justification, even without proof to sustain it, may not be considered as evi-

App. Div.] First Department, February, 1912.

dence of malice and in aggravation of damages, for the reason that "The jury may not look for the actual malice which shall nullify the privilege, in the fact that the defendant has put upon the record a justification which he has not attempted to sustain;" but in *Youmans v. Paine* (86 Hun, 479), which was a case of a privileged communication, the court, citing *Marx v. Press Publishing Co.* (134 N. Y. 561), held that the jury had the right to determine as a question of fact whether the justification of the article was set up in good faith. Moreover, the court was here charging *not with respect to plaintiff's right to recover, but with respect to the amount of damages if he was entitled to recover*. The court, by this charge, was merely stating the general proposition sustained by *Cruikshank v. Gordon* (118 N. Y. 178), that a plea of justification in libel, if not made in good faith, may be considered in aggravation of damages. By this charge the jury were not instructed that they might consider the plea as evidence of malice if they found that the article was privileged, for malice had to be found before they reached the question of damages. The court did not err in stating to the jury the general rule of law that the burden is on the defendant to establish a privilege claimed, for, at the request of the appellant, the court charged that the editorial afforded a privileged occasion, which rebutted "any inferences which the law would otherwise make that defendant's publication was false or malicious," and that defendant's publication was presumptively privileged; and further that no recovery could be had unless the privilege was abused to such an extent as to show actual malice, which could not be found on the use of intemperate or excessive language or fair and proper criticism of *Collier's* motive for publishing the editorial. These instructions if not more favorable to appellant than the law warranted were, at least, extremely favorable to it.

Complaint is also made of the charge in so far as the jury were permitted to consider the publication of the alleged libel in forty-four newspapers in the State of New York, and the further extensive circulation of it, as evidence of malice, giving them the right in their discretion to award punitive damages. Every separate publication of a libel gives rise to a cause of action, and, therefore, each of the forty-four publications in

First Department, February, 1912.

[Vol. 149.]

New York constituted a separate cause of action. (*Union Associated Press v. Heath*, 49 App. Div. 247.) The complaint embraced only the publications in the county of New York, and the record indicates that the evidence of the other publications was received merely on the question of malice, although it was not expressly so limited either when received or in the charge. The discussion, however, in the presence of the jury on objection to its reception showed that respondent's counsel only claimed that it was competent on that question. I am of opinion that it was competent evidence, and that the jury were properly instructed that it might be considered on the question of malice *in determining* whether exemplary damages *should be* awarded. The court did not instruct the jury that it could not be considered *on the question of damages*, but no request so to charge was made.

I have now discussed every point presented by the learned counsel for the appellant, and have shown, I think, that, even on the theory on which the case was tried, no error prejudicial to the rights of the appellant is presented for review *by exception*, and that plaintiff was entitled to recover as matter of law, and the only question for determination was the amount of the verdict. If, however, errors were committed it does not follow that there should be a reversal. Even on the review of a conviction in a criminal case the Legislature has *commanded* that "the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." (Code Crim. Proc. § 542.) There is no presumption that an *error* committed on the trial is sufficiently prejudicial to the rights of the appellant to entitle him to a reversal, and he is not entitled to a new trial unless it appears that the error affected the verdict to his prejudice. In *Post v. Brooklyn Heights R. R. Co.* (195 N. Y. 62), in reviewing an appeal in a civil case the Court of Appeals unanimously held as follows: "There are errors in this record, but we find none calling for reversal, when the circumstances under which the erroneous rulings were made and their probable effect on the result are taken into account. Under our system of appeals every error does not require a new trial, for the vast judicial work of the State could not be done on that basis. Unless the

App. Div.]First Department, February, 1912.

error is so substantial as to raise a presumption of prejudice, it should be disregarded, for undue delay is a denial of justice." The verdict is large, but I would not say that it is excessive, for the libel was extremely denunciatory and defamatory. *Collier's* was rendering a commendable public service. The defendant put its food products on the market and advertised them, and that subjected both products and advertisements to criticism, and for any fair and honest criticism, no matter how severe or extreme which did not mis-state a material fact, the law afforded appellant no redress. (Odgers Lib. & Sland. [5th ed.] 194, 216, 217. See, also, *Triggs v. Sun Printing & Pub. Assn.*, 179 N. Y. 144; *Hoey v. New York Times Co.*, 138 App. Div. 149.) The attack upon *Collier's* in the libelous article with respect to the motive for its editorial and the falsity thereof was without justification, and malice stands out in every sentence of it. The evidence fairly preponderates in favor of the respondent that appellant was guilty of deceptive advertising, and upon all the issues. It may fairly be presumed that the plaintiff was greatly damaged by the injury to his feelings, to his reputation and to his business, for, if the charges contained in the libel thus extensively published were believed, even by a small percentage of the readers of the libel, the prestige of *Collier's* would be seriously impaired, and its circulation would be seriously affected, and its proprietors would be greatly humiliated; and in view of the deliberation with which the libel was published, and its venomous character, it presented a case for the award of heavy exemplary damages. It may be that the opening of trial counsel for respondent and the course of the trial, of which complaint is made, were prejudicial to appellant on the question of damages and that allowance should be made by requiring respondent, as a condition of not granting a new trial, to stipulate for a liberal reduction as is sometimes done, but since this is to be a minority opinion I do not deem it necessary to express an opinion on that point.

I, therefore, vote to affirm.

DOWLING, J., concurred.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

LEO OPPENHEIMER, as Trustee in Bankruptcy of MICHAEL H. GILLESPIE and WILLIAM E. WALSH, Individually and as Copartners Composing the Firm of GILLESPIE, WALSH & GILLESPIE, Appellant, *v.* THE CITY OF NEW YORK, Defendant.

CHELSEA EXCHANGE BANK, Respondent.

First Department, February 16, 1912.

Practice — motion to intervene as defendant — action on contract — assignee of moneys due.

On the trial of an action by a trustee in bankruptcy to recover a balance due the bankrupt on a municipal contract, the court has no power over plaintiff's objection to grant a motion permitting a bank to which the bankrupt had duly assigned a portion of the money due or to grow due on the contract to intervene.

The fact that the city certified at the inception of the contract that it had the money to pay for the work and the fact that the complaint alleges that other funds in the city's possession are applicable to the payment of plaintiff's claim do not show that the plaintiff seeks payment from a specific fund.

APPEAL by the plaintiff, Leo Oppenheimer, as trustee, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of October, 1911, as resettled by an order entered in said clerk's office on the 23d day of November, 1911, granting the motion of the Chelsea Exchange Bank to intervene in the action as a party defendant.

Frederick Hulse of counsel [*Eidlitz & Hulse*, attorneys], for the appellant.

W. W. Shaw of counsel [*Shaw, Fisk & Shaw*, attorneys], for the respondent Chelsea Exchange Bank.

CLARKE, J.:

Appeal from an order made on the motion of the Chelsea Exchange Bank directing that it be made a party defendant.

The complaint alleges that Gillespie, Walsh & Gillespie had a contract with the city for building the new police headquarters for \$662,250, payable in installments as provided, and that the firm proceeded to perform until December 31, 1907, when a

App. Div.] First Department, February, 1912.

petition that they be adjudged bankrupts was filed. They were adjudicated bankrupts February 17, 1908. The plaintiff was appointed trustee and authorized to proceed with the work and did so. The complaint demands \$73,548 as a balance unpaid on said contract and \$24,542.35 for certain extra work under subsequent contracts and orders.

The city alleges in its answer, for a partial defense, that theretofore and before the commencement of this action, and on or about the 1st day of May, 1907, Gillespie, Walsh & Gillespie, by an instrument in writing and under seal, duly assigned to the Chelsea Exchange Bank of the city of New York the sum of \$20,000 of the retained percentages due or to grow due for and by virtue of said contract, and duly delivered said assignment to the Chelsea Exchange Bank and to defendant; that by virtue of said assignment the Chelsea Exchange Bank became entitled to said sum of \$20,000 and has all right, title and interest thereto and the plaintiff, as trustee in bankruptcy by reason of the assignment aforesaid, is deprived of all right and title to the said sum. The Chelsea Bank, setting up the same matters, moved that it be made a party defendant.

The learned Special Term granted the motion upon the authority of *Gittleman v. Feltman* (191 N. Y. 205). But in that case the motion was made by plaintiff to bring in as a defendant a third person claimed to be a joint tort feasor with the other defendants, and the precise question which the Court of Appeals answered in the affirmative was: "Has the Supreme Court, upon the motion of the plaintiff, in an action to recover damages for personal injuries resulting from negligence, the power to bring in as defendant a party not named as a defendant at the time of the commencement of the action against the objections of the defendants originally named and of the proposed new defendant?" and said: "The true test, doubtless, is as to whether the person could have been joined as a party at the commencement of the action, and whether the plaintiff has given a satisfactory excuse for his failure so to do."

It is evident, we think, that the case cited does not apply. This is a motion, not by the plaintiff, but by the bank seeking to have itself made a party defendant, and the only statutory authority for such a proceeding is found in the 2d sentence

of section 452 of the Code of Civil Procedure: "And where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

In *Bauer v. Dewey* (166 N. Y. 402) plaintiff brought an action to recover \$2,500 as compensation for services as a real estate broker. One Delack made a motion to intervene, alleging that he was entitled to one-half the commissions. The Special Term granted an order permitting Delack to intervene and that order was affirmed by the Appellate Division by a divided court (56 App. Div. 67). An appeal was allowed and this question certified: "1. Has the Supreme Court power to compel the plaintiff, in an action in which a money judgment only is sought, and in which the title to specific property is not involved, to bring in as a defendant a third party on his own application, and to order a supplemental summons and complaint served upon him?" The court unanimously answered that question in the negative and said: "The purpose of this action was to recover a debt of the defendant to the plaintiff. The title to no real, specific or tangible personal property was involved. The claim of Delack was that by virtue of an agreement between himself and the plaintiff's assignor, he was entitled to one-half of the defendant's debt. * * * If Delack were permitted to become a party to the action, other issues than those involved between the plaintiff and the defendant would be presented. Instead of its being an action merely to determine whether the defendant was indebted to the plaintiff, and if so, the amount, it would be transformed into an action involving not only that issue, but the fraud of the plaintiff's assignor and in effect constitute an action to set aside a receipt or paper signed by Delack. We are of the opinion that section 452 furnishes no authority for such an order."

There is no substance in the claim here that a specific fund is being pursued because the city certified at the inception of the contract that it had the money to pay and because the complaint alleges that there are funds in the possession of the

App. Div.] First Department, February, 1912.

defendant applicable to the payment of the said sum to the plaintiff. This is a common-law action to recover a sum due on a contract. If the bank has a cause of action on the assignment it could have long since sued thereon. Under the *Bauer Case* (*supra*) the court has no power upon the motion of the bank and against the opposition of the plaintiff to inject it into the case as a party defendant. If it had the power it ought not to exercise it.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and MILLER, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

LEO OPPENHEIMER, as Trustee in Bankruptcy of MICHAEL H. GILLESPIE and WILLIAM E. WALSH, Individually and as Copartners Composing the Firm of GILLESPIE, WALSH & GILLESPIE, Appellant, *v.* THE CITY OF NEW YORK, Defendant.

THE SECURITY BANK OF NEW YORK, Respondent.

First Department, February 16, 1912.

See head note in *Oppenheimer v. City of New York (Chelsea Bank)* (*ante*, p. 172).

APPEAL by the plaintiff, Leo Oppenheimer, as trustee, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of October, 1911, as resettled by an order entered on the 23d day of November, 1911, directing that the Security Bank of New York be made a party defendant.

Frederick Hulse of counsel [*Eidlitz & Hulse*, attorneys], for the appellant.

Robert R. Reed of counsel [*Caldwell, Masslich & Reed*, attorneys], for the respondent Security Bank.

CLARKE, J.:

This is a similar motion to that presented in *Oppenheimer v. City of New York (Chelsea Bank)* (149 App. Div. 172), handed down herewith, the Security Bank having procured an order for its introduction as defendant, basing its application upon an assignment of forty thousand dollars out of the retained percentages, and for the reasons set forth in the preceding case the order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and MILLER, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

FREDERICK MULLER and Others, Copartners, Doing Business under the Firm Name and Style of MULLER, SCHALL & COMPANY, Plaintiffs, *v.* JOSEPH KLING, as General Assignee for the Benefit of Creditors of the Firm of SCHOLTZ, SANCHEZ & COMPANY, Defendant.

First Department, February 2, 1912.

Bills and notes — purchase of draft on faith of statement that acceptance was secured — general assignment by drawer — failure of drawee to accept — equitable right of payee to security — when draft works assignment of particular fund — submission of controversy — statement of facts.

Plaintiffs purchased a draft on a drawee in the Republic of France, being induced thereto by a statement of the drawers that the drawee had promised to accept the draft upon the security of another draft drawn by the same parties upon a drawee in Italy, who was indebted to them for goods sold. The Italian draft was sent to the drawees in France and the drawee in Italy was notified thereof. Before the French draft was presented the drawers made a general assignment for the benefit of creditors, whereupon the drawees in France refused to accept and returned the Italian draft to the assignee without presenting it for payment in Italy. Both the plaintiffs and the assignee made claims upon the debtor in Italy, who thereupon paid the money to the assignee subject to a determination as to the plaintiffs' right thereto.

App. Div.] First Department, February, 1912.

Held, that in equity the purchase of the French draft upon the drawee's promise to accept it, coupled with the drawer's promise to secure the drawee, entitled the purchaser to the promised security upon the failure of the drawees to accept;

That the Italian draft upon a drawee whom the plaintiffs were informed was indebted to the drawers was intended as security and, in effect, created a lien or charge upon the drawee's debt;

That in equity the assignee of the drawers held the funds received from their debtor in trust for the plaintiffs, who were entitled thereto.

While a draft drawn upon the general credit of the drawer with the drawee does not operate as an assignment of a particular fund, even though one to which the draft is to be charged is indicated, yet where it is the intention of parties that the draft shall be paid out of a particular fund and not absolutely and at all events, it operates as an assignment of the fund.

On a submission of a controversy upon an agreed statement of facts the court cannot choose between conflicting inferences which are permissible, but must confine its decision to the facts stated.

DOWLING and LAUGHLIN, JJ., dissented, with opinion.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

George A. Strong, for the plaintiffs.

Charles S. Yawger [Graves & Miles, attorneys], for the defendant.

MILLER, J.:

On May 9, 1898, the firm of Scholtz, Sanchez & Co. drew the following draft:

"No. 1233. NEW YORK, May 9th, 1898.

"No. 45305 ne varietur.

"Exchange for Frs. 35,000.

"At sixty days after sight of this first of exchange (Second not paid) pay to the order of Messrs. Muller, Schall & Co. the sum of thirty-five thousand francs. Value received which place to account as advised.

"SCHOLTZ, SANCHEZ & CO.

"(de N. & C. ie.)

"To Messrs. Demachy & F. Seilliere, Paris.

"Rue de Provence 58."

APP. DIV.—VOL. CXLIX. 12

First Department, February, 1912.

[Vol. 149.]

And on May 10, 1898, in the city of New York, sold it to the plaintiffs, the payees, and received therefor the sum of \$6,662.50. To induce the plaintiffs to purchase the draft, the drawers exhibited to them a letter, written by the drawees, promising to accept the drawers' drafts up to the limit of 250,000 francs upon the security of drafts drawn by the latter upon Jose Invernizio of Tortona, Italy, to be furnished therewith; and at the same time the said drawers informed the plaintiffs that they would secure said draft by sending to the drawees another for like amount upon said Invernizio, and that the latter was indebted to them in that amount upon an open account for goods sold, *which was the fact*. The said drawers did draw the following draft:

“Scholtz, Sanchez & Co. No. 1234.

“NEW YORK, May 9th, 1898.

“Exchange for Frc. 35,000.

“At sixty days after sight of this first of exchange (Second not paid) pay to the order of Messrs. Demachy & F. Seilliere the sum of thirty-five thousand francs. Payable in Paris. Value received which place to account as advised.

“SCHOLTZ, SANCHEZ & CO.

“To Mr. Jose Invernizio, Tortona, Italy.”

And sent it to the payees therein named, the drawees of the first draft, with a letter of advice, in which they stated:

“Against this remittance we have taken the liberty of drawing on you our draft #1233 at 60 days' sight, in favor of Messrs. Muller, Schall & Co. for Fcs. 35,000 which please accept as usual.”

They also on the same day wrote to Invernizio referring to his having authorized them to draw at sight on him for account of shipments made to his house in Caracas, and informing him of said draft drawn upon him. The plaintiffs sent the draft purchased by them to their Paris correspondent for presentment to the drawees, but before it was presented the drawers, under the laws of the State of New York, made a general assignment for the benefit of creditors to the defendant; wherefore the drawees refused to accept the draft when it was presented, and, without presenting the Invernizio draft

App. Div.] First Department, February, 1912.

for payment, returned it to the defendant. Both the plaintiffs and the defendant thereupon made claim upon Invernizio for the amount of the draft drawn upon him. Thereafter it was arranged that Invernizio should pay the defendant, and that the latter should hold the money subject to a determination between him and the plaintiffs as to who had the better right to it. Accordingly, upon the delivery to him of said two drafts, a letter of the plaintiffs, withdrawing all claim against him, and a release of the defendant, Invernizio paid to the defendant the sum of \$4,931.13. This controversy is to determine who has the better right to said fund and the accumulated interest.

At first glance, it seems plain that in equity and good conscience the plaintiffs have the better right to the fund, but when we come to support our off-hand impression by settled principles, we encounter difficulties.

Both drafts were upon their face negotiable bills of exchange, and it is well settled that a draft, drawn upon the general credit of the drawer with the drawee, does not operate to assign a particular account or fund, even though one is indicated, to which the draft is to be charged or out of which the drawee is to reimburse himself, as the case may be. If, however, it was the intention and understanding of the parties that the draft should be paid out of a particular fund and not absolutely and at all events, it will operate as an assignment thereof. (*Brill v. Tuttle*, 81 N. Y. 454.)

Our difficulty is not lessened by the circumstance that the case is submitted upon an agreed statement of facts, for, if conflicting inferences are permissible, we may not choose between them, but must confine our decision to the facts stated. (*Bradley v. Crane*, 201 N. Y. 14; *Marx v. Brogan*, 188 id. 431.)

I think it is a necessary conclusion from these facts that the plaintiffs purchased the draft on Demachy & F. Seilliere on the faith of their promise to accept it upon the security of the Invernizio draft to be furnished therewith, and on the faith of the drawers' promise to send to the drawees a draft for like amount on Invernizio, and in reliance upon the drawers' assurance that Invernizio was indebted to them in that amount.

While the precise terms of the stipulation do not go so far, it seems to me that such is their necessary import. The letter of Demachy & F. Seilliere was exhibited to the plaintiffs to induce them to make the purchase at the same time the drawers informed the plaintiffs that they would send to Demachy & F. Seilliere the security required — *i. e.*, a draft on Invernizio — and that the latter owed them the amount of the draft. While the word “informed” is used in the stipulation, it seems obvious that it is to be construed to mean “promised,” and that the information given was intended as an assurance to be relied upon, else there was no point in including it in the statement of agreed facts. Thereupon, so the stipulation reads — *i. e.*, upon being informed that the required draft on Invernizio would be forwarded and that the latter owed the drawers that amount — the plaintiffs purchased the draft on Demachy & F. Seilliere. It is not to be assumed that the information given the plaintiffs was to satisfy idle curiosity.

If Demachy & F. Seilliere had accepted the draft on them, but had failed to pay at maturity, the plaintiffs on the principle of subrogation would have been entitled to the Invernizio draft, or its proceeds. (*Ten Eyck v. Holmes*, 3 Sandf. Ch. 428; *Vail v. Foster*, 4 N. Y. 312; *Wager v. Link*, 134 id. 122; 150 id. 549.) I am unable to perceive how in principle the case is any different from the fact that the drawees broke their promise to accept, instead of a promise to pay after acceptance. They had given a promise to accept, qualified only by the condition that they be furnished a like draft on Invernizio. On the faith of that promise and the drawers’ promise to comply with that condition, the plaintiffs paid \$6,662.50 to the latter. Upon the receipt by the drawees of the Invernizio draft, they stood in a sense as surety for the drawers to the plaintiffs, who had advanced money on the faith of their promise.

It is frequently a nice question to what extent a promise to accept a bill not in existence binds the promisor to third parties who have acted on the faith of it. Section 223 of the Negotiable Instruments Law provides: “An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.” (See Gen. Laws, chap. 50

App. Div.] First Department, February, 1912.

[Laws of 1897, chap. 612], § 223; Consol. Laws, chap. 38 [Laws of 1909, chap. 43], § 223.)

The Revised Statutes contained the same provision (see 1 R. S. 768, § 8), which was but declaratory of the common law. (See *Mason v. Hunt*, 1 Doug. 297.) In that case Lord MANSFIELD said: "But an agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill knowing of the conditions annexed to the agreement, he takes it subject to such conditions." (See on the general subject *Coolidge v. Payson*, 2 Wheat. 66; *Murdock v. Mills*, 11 Metc. 5; *Greele v. Parker*, 5 Wend. 414; *Bank of Michigan v. Ely*, 17 id. 508; *Ulster County Bank v. McFarlan*, 5 Hill, 432; 3 Den. 553; *Shaver v. Western Union Tel. Co.*, 57 N. Y. 459; *Merchants' Bank v. Griswold*, 72 id. 472; *Ruiz v. Renauld*, 100 id. 256; *Germania National Bank v. Taaks*, 101 id. 442; *Story Bills*, § 249; 1 Pars. Notes & Bills, 292.) To be sure, the Negotiable Instruments Law only covers the case of an unconditional promise to accept, doubtless because, in general, conditions attached to commercial paper deprive it of the attribute of negotiability, though an acceptance of a bill may be conditional. The fact that the promise to accept in this case was conditional upon the drawee's having security is a cogent, if not a controlling, reason for thinking that the bills were not drawn on the general credit of the drawers, and that the rules applicable to negotiable bills do not apply. Very likely the obligations of the drawees depend on the laws of France (see *Boyce v. Edwards*, 4 Pet. 111), but it is not necessary for us to determine precisely what those obligations were. We are dealing with a contract made in the State of New York, and are directly concerned only with the rights of the immediate parties to it as between themselves. It is sufficient for our purpose to hold that the purchase of a draft upon the drawees' promise to accept it, coupled with the drawers' promise to secure the drawees, equitably entitled the purchasers to the promised security upon the failure of the drawees to fulfill their promise, and that, too, independently of the precise nature of the obligation assumed by the drawees on making the promise.

The question still remains whether the Invernizio draft operated to transfer, or to create any charge or lien upon,

First Department, February, 1912.

[Vol. 149.]

Invernizio's debt to the drawers. If the plaintiffs have no interest or right in the Invernizio draft except by subrogation to the rights which Demachy & F. Seilliere would have had upon their acceptance of the draft on them, our consideration of that question must be confined to the intention and understanding of the drawers and Demachy & F. Seilliere, the payees as between themselves; and here we are confronted with the difficulty that the statement of agreed facts does not disclose precisely what the arrangement between them was. We know that Demachy & F. Seillière had agreed to accept drafts "upon the security of" like drafts on Invernizio, and that the Invernizio draft was sent to them with a letter stating that the drawers had drawn "against this remittance" in favor of the plaintiffs, but we are not even informed whether they knew that Invernizio was the drawers' debtor. It is certain that they were unwilling to accept drafts on the drawers' credit alone, for their promise to accept was conditional upon having security. An unaccepted draft on a third party would furnish no security, unless the drawee was the drawers' debtor, and then only in case it was the drawers' intention to transfer, or create a charge or lien upon the debt. It is fairly to be inferred, therefore, that in agreeing to accept the Invernizio draft as security the payees understood either that he was obligated to accept it, or that he had funds in his possession belonging to the drawers. Indeed, it might almost be assumed as a matter of course from the form of the transaction that it was but a means to enable the drawers of the two drafts to transfer or realize upon a credit which they had with the ultimate drawee, Invernizio. However, we are dealing with what appear to be ordinary negotiable bills, and I doubt whether the fact that the drawees of one draft stipulated for security in the form of another draft on a third person is alone sufficient to justify the conclusion as a matter of law that the parties intended the latter to operate to transfer, or create a lien or charge upon a particular fund. So far then as this submitted controversy is concerned the plaintiffs must rely on their own equities.

Viewing the matter, then, in the light of the knowledge which the plaintiffs had when they purchased the Paris draft,

App. Div.]

First Department, February, 1912.

the case is simply this: Invernizio in Tortona, Italy, was indebted to Scholtz, Sanchez & Co. in New York in at least the sum of \$7,000 on open account. The latter wished to convert that credit into money. They had an arrangement with a firm in Paris to accept their drafts secured by drafts on Invernizio, and they procured the plaintiffs to advance them the money on the promise of the Paris firm and on their promise to furnish the required draft on their debtor. More briefly stated, the plaintiffs purchased a draft to be secured by a draft on the drawers' debtor. Plainly they were entitled to that security, and I think their equities in it are to be determined according to the intention and understanding of the parties to the contract of purchase and sale, of which the stipulation to give security was a part. The fact that plaintiffs had other security — *i. e.*, the conditional promise of the Paris firm — does not deprive them of the right to look to the ultimate security for reimbursement; *i. e.*, the debt of Invernizio. Instead of selling the Invernizio draft directly to the plaintiffs, a draft on an intermediary, secured by the Invernizio draft, was employed. Thus the plaintiffs had added security in the form of that intermediary's promise to accept. Still the real purpose of the transaction was to enable the drawers to realize upon the ultimate security Invernizio's debt. The intermediaries having failed to perform their promise, I think we may lay them altogether out of the case and treat the draft on Invernizio as though it had in the first instance been made to the plaintiffs, the only persons who parted with money on the faith of it. Of course, if the plaintiffs had purchased on the credit of the drawers, as is the case of the ordinary mercantile transaction of the purchase of an unaccepted negotiable bill, they would have to stand on an equality with other creditors of the drawers. But the stipulated facts preclude that hypothesis. Security was to be given. A draft was to be drawn upon a drawee, who, the plaintiffs were informed, was indebted to the drawers. By treating that unaccepted draft as security, the parties, in legal effect, said that it was intended to transfer or create a lien or charge upon the drawee's debt.

It is wholly immaterial that the draft was never presented to or accepted by Invernizio. This is not a suit on the draft.

We are only concerned with the rules of the Law Merchant to the extent of determining whether they can operate to deprive the plaintiffs of their plain equities. The question before us is whether the plaintiffs or Scholtz, Sanchez & Co., in whose shoes the defendant stands, shall have the funds which Invernizio has turned over. Somewhat differently stated, the question is whether Scholtz, Sanchez & Co., having obtained the plaintiffs' money on the faith of Invernizio's debt to them, shall now be permitted to collect the debt. To put the case in a plainer light, suppose, instead of making an assignment for the benefit of creditors, Scholtz, Sanchez & Co. had in some way obtained payment from Invernizio before the draft on him was presented, with the result that, when it was presented, he refused to accept it. Plainly that would have been a breach of the implied obligation assumed by them when they obtained the plaintiffs' money in part at least on the faith of Invernizio's indebtedness to them. Indeed such conduct might well be characterized by a harsher term. Can there be any doubt that in such a case equity would treat them as trustees for the plaintiffs? I am unable to perceive how their assignee, who has obtained the money subject to the plaintiffs' equities, is in any better position.

It is unnecessary to go so far as to decide that the draft operated as an equitable assignment, and the cases which have arisen between payee and drawees are not in point. Indeed, I think that the parties could have agreed that the debt of the drawee should be treated as security without in any way interfering with the negotiability of the bill. If they intended that Invernizio's debt should be a security for the ultimate payment of the draft, equity, as between the parties or volunteers, can give effect to that intention by creating a lien or charge upon the debt, if not by raising a trust out of the circumstances of the case. The only hesitation I have is as to whether we can say from the agreed facts as a matter of law that such was the intention of the parties. In *Throop Grain Cleaner Company v. Smith* (110 N. Y. 83) the court held as a matter of law that the surrounding circumstances showed an intention of the parties that the drafts drawn by a creditor on its debtor should operate to transfer the debt to the payee, and in *Fourth Street Bank v.*

App. Div.] First Department, February, 1912.

Yardley (165 U. S. 634) the court from stated facts deduced as matter of law an intention of the parties to transfer *pro tanto* to the payee of a check a fund consisting of cash and collection items in the hands of the drawee bank belonging to the drawer. In that case Mr. Justice WHITE reviewed the authorities bearing on the application of equitable doctrines in such cases. As I read his opinion, the controlling consideration was that the payee had parted with its money on the security of the fund in the hands of the drawee. To be sure it was expressly stated in that case as it is not stated in this that the plaintiff relied upon the representations made with respect to the fund in the hands of the drawee. However, it is expressly stated that the written promise of Demachy & F. Seilliere was shown the plaintiffs "to induce" them to purchase the draft. The necessary conclusion, then, is that they did not purchase on the credit of the drawers. They were "informed" by the drawers that the latter "would secure the draft" by one on Invernizio. That statement necessarily implied an agreement by which, as a part of the contract of purchase and sale of the first draft, the drawers were thus to "secure" it. The parties, therefore, expressly referred to the Invernizio draft as security for the payment of the other. It could not before acceptance add any security whatever unless it was intended by it to transfer or create a lien or charge upon a fund of the drawers in the hands of the drawee. The plaintiffs were informed that the drawee was indebted to the drawers in the amount of the draft and thereupon agreed to purchase the draft thus secured. It seems to me that they are entitled to look to the security thus expressly stipulated for, not to a piece of paper, which added nothing to the obligations of the drawers, but to the fund which gave that piece of paper the characteristics of a security.

The plaintiffs should have judgment in accordance with the terms of the stipulation.

INGRAHAM, P. J., and McLAUGHLIN, J., concurred; DOWLING and LAUGHLIN, JJ., dissented.

DOWLING, J. (dissenting):

The agreed statement of facts upon which this controversy was submitted contains no recital that Muller, Schall & Co.

First Department, February, 1912.

[Vol. 149.]

relied upon the promise of Demachy & F. Seilliere to accept the drafts of Scholtz, Sanchez & Co. upon them up to the limit of 250,000 francs, upon the security of drafts drawn by Scholtz, Sanchez & Co. upon Guiseppe or Jose Invernizio to be furnished therewith, nor does it appear that the plaintiffs were induced to purchase the drafts in question upon the faith of any such promise, or that such promise was a valid and subsisting one when shown to plaintiffs. Their letter is not in the record, nor, in fact, is there any document signed by them before us from which we can determine either the extent to which they were bound, if at all, or their reasons for refusing to fulfill their promise. Upon the facts stipulated all that is apparent is that plaintiffs bought the draft in suit from defendant's assignors, knowing of a promise made to the latter by the drawees that they would accept the draft if accompanied by a draft to a like amount upon a debtor of the assignors. There was no privity between plaintiffs and Demachy & F. Seilliere. The security of the Invernizio draft was not for plaintiffs' benefit, but for that of Demachy & F. Seilliere, to indemnify them for their acceptance by a good draft upon a third party. Plaintiffs never were promised the Invernizio draft as security to them. They parted with their money, not even relying upon the promise of Demachy & F. Seilliere to accept the draft thus bought. If Demachy & F. Seilliere accepted the draft, though under no legal obligation to do so, plaintiffs had obtained all they were promised. When Demachy & F. Seilliere refused to accept the draft, being under no apparent legal obligation so to do, and returned the Invernizio draft to defendant, the eventuality for which the latter draft had been given had failed, and the Invernizio account remained the property of the assignors, as if no draft thereon had ever been drawn. The transaction then remained one of the simple purchase of a negotiable bill of exchange, drawn on the general credit of the drawer, which could not operate as an assignment of any particular account or fund.

Nor can plaintiffs find relief under the provisions of the Negotiable Instruments Law (Gen. Laws, chap. 50 [Laws of 1897, chap. 612], § 223; Consol. Laws, chap. 38 [Laws of 1909, chap. 43], § 223), because thereunder the promise in writing to

App. Div.] Second Department, February, 1912.

accept a bill before it is drawn must be unconditional before it can be deemed an actual acceptance in favor of every person who upon the faith thereof received the bill for value. Here the promise was not unconditional, but by its very terms conditional, and it does not appear that plaintiffs received the bill upon the faith of the promise.

It would seem, therefore, that judgment should be given in favor of defendant, with costs.

LAUGHLIN, J., concurred.

Judgment ordered for plaintiffs in accordance with stipulation. Order to be settled on notice.

BRIDGET SHANLEY, as Administratrix, etc., of JAMES SHANLEY, Deceased, Respondent, *v.* THE CITY OF NEW YORK, Appellant.

Second Department, February 16, 1912.

Master and servant—negligence—death of workman in manhole—Employers' Liability Act—foreman and superintendent distinguished—liability of master for neglect of fellow-servant.

In an action to recover damages for the death of the plaintiff's intestate, based upon the alleged negligence of the foreman of a gang of men sent out by the defendant to remove an obstruction from one of the sewers, it appeared that while the deceased was in a manhole manipulating a rod for the purpose of removing the obstruction, a sudden rush of water came upon him, and after several futile attempts on the part of those who were at hand to rescue him, he was overcome and drowned.

Held, that under the evidence the alleged foreman was not a superintendent within the meaning of the Employers' Liability Act, so as to entitle the plaintiff to recover on that ground;

That the deceased, an experienced man, elected to do the work in question, knowing all the surroundings, and that he himself directed the removal of a ladder which would have enabled him to escape.

There is a distinction between a foreman or leader of a gang of men and a superintendent such as is described in the Employers' Liability Act.

Where the work is such that the master owes no duty of furnishing a superintendent as a part of the corps of competent fellow-servants, or if he has furnished a competent superintendent and the accident happened through no neglect of such superintendent, but through the error or neglect of a fellow-servant engaged in the carrying out of the details of the work, there is no liability under the Employers' Liability Act.

Second Department, February, 1912.[Vol. 149.]

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 18th day of January, 1911, upon the verdict of a jury for \$3,500, and also from an order entered in said clerk's office on the 21st day of February, 1911, denying the defendant's motion for a new trial made upon the minutes.

James D. Bell [Frank Julian Price and Archibald R. Watson with him on the brief], for the appellant.

Robert H. Roy, for the respondent.

WOODWARD, J.:

Plaintiff's intestate was one of a gang of five men sent out by the defendant on the afternoon of November 24, 1909, to clear an obstruction from one of the sewers at Frost street and Graham avenue in the borough of Brooklyn. While he was in the manhole manipulating a rod for the purpose of removing the obstruction which had caused the sewage to back up into the cellars in that locality, a sudden rush of waters came upon him, and after several futile attempts on the part of those who were at hand to rescue him, he was overcome and drowned. This action is predicated upon the alleged negligence of the superintendent of this work under the provisions of the Employers' Liability Act, and the most important question (for there is no other possible ground of liability) is, whether the foreman of this gang of men, sent out to do an isolated piece of work in clearing out an obstruction in a sewer pipe, was "intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." (See Labor Law [Consol. Laws, chap. 31; Laws of 1909, chap. 36], § 200.) The jury has found a verdict in favor of the plaintiff, and if this foreman was in fact a superintendent within the meaning of the Employers' Liability Act, it would go a long way to support the judgment.

The learned counsel for the respondent asserts that "There can be no question that Lowery had been appointed foreman of

App. Div.] Second Department, February, 1912.

the gang," but no evidence is pointed out to show that the defendant had ever appointed him as foreman. However this may be, there is a distinction between a mere foreman or leader of a gang of men, and a superintendent such as is described in the act here under consideration. (*Abrahamson v. General Supply & Construction Co.*, 112 App. Div. 318.) Upon the question of superintendence the learned counsel for the respondent calls attention to the testimony of Lowery that "I ordered the ladder down right away to him, and the water came to about here on him. When I ordered the ladder to be taken to him, I kept my eyes on him;" to the testimony of Higgins, the general foreman in the sewer department, who was not present at the time of the accident, that "One man was designated over each gang sent out;" to the testimony of Tuffey, one of the workmen in the gang, that "Mr. Lowery had charge of the gang;" to the testimony of Graham, another member of the gang, that "Mr. Lowery was foreman of that gang;" and to the testimony of Hickey, another workman, that "Lowery was the foreman in charge." This is the entire testimony to which attention is called as tending to support the respondent's first point, that "Lowery was a superintendent within the meaning of the Employers' Liability Act." Mr. Higgins, who says he was the "foreman over the gang of men sent out to clean the sewers," under the bureau of sewers, does not say that Lowery was a foreman; he merely says: "One man was designated over each gang sent out. Lowery did not receive any more pay than any of the other men employed with him in that gang. I know that Lowery did the actual work with the other men of cleaning out the sewers. It is a fact that Lowery himself would go into the holes and rod these places." Lowery himself says: "When I arrived there, I went down the first manhole myself, and I took a small bulk out of it. * * * I often went down these manholes myself at times—always did. It was part of my duty when I went out; part of my duty, the same as any of the rest of them. I had been working for the sewer department before this accident, a little over eleven years." John J. Graham, one of the gang, says: "The work Lowery did was to go down in the hole the same as the other men. That was his business to rod holes, him and Mr. Shanley"

Second Department, February, 1912.

[Vol. 149.]

(plaintiff's intestate). There is not a suggestion anywhere in the testimony that the city of New York, either by any of its officials or by any one charged with the duty of superintending the sewers, had ever even appointed, or knew of the appointment of Lowery as a foreman, much less to the position of a superintendent. Inferentially the testimony indicates that Mr. Higgins, who says: "I was acting foreman of the repair yard, Bureau of Sewers. I was foreman over the gang of men sent out to clean the sewers," had "designated" Lowery as being "over" the particular gang sent out to do this work, but this is the nearest approach to any testimony showing authority in Lowery, with the exception of the testimony of some of his fellow-laborers, that Lowery was the foreman in charge of this gang. It looks very much as though the probative evidence went no further than to show that Lowery was designated as being "over" this particular gang of men in the performance of this single job, not by a superintendent, but by one who claimed no higher authority than that of a foreman. The job itself was of such a character that it did not require the employment of a superintendent; the master could intrust the work to competent fellow-servants, for it involved no difficult problems in the ordinary sense; it was merely going down into a manhole connecting with a sewer pipe and running a long rod through the pipe in the effort to dislodge the obstruction, and while in this particular instance there was a body of water back of the obstruction which resulted in a tragedy, the fact was well known to all of the men who were engaged in the work, and plaintiff's intestate had had more than a year of experience in this line of work, and all of those who were there appear to have been familiar with the details of the work and knew just what to do. There is nothing suggested as being necessary to this work which any man of ordinary intelligence could not perform as well alone as under the direction of a superintendent, and there is absolutely no evidence in the case to show that any one of the fellow-servants was not competent. Where the work is such that the master owes no duty of furnishing a superintendent as a part of the corps of competent fellow-servants; or if he has furnished a competent superintendent and the accident happened through no neglect of

App. Div.]

Second Department, February, 1912.

such superintendent, but through the error or neglect of a fellow-servant engaged in the carrying out of the details of the work, there can be no liability under the Employers' Liability Act. (*Abrahamson v. General Supply & Construction Co., supra.*) Here there is no evidence that a superintendent was employed; no evidence from which the necessity or justification for the employment of a superintendent can be spelled out, and it cannot be presumed, in the absence of such evidence, that the defendant would employ a superintendent for this simple work. This is not the case of a man being sent into a dangerous situation by one of superior authority upon an implied assurance that the place is safe, for it clearly appears from the undisputed evidence that Lowery himself offered to go into the hole, but was overruled by plaintiff's intestate. Lowery testifies that after going into the first manhole himself, "I came up and we went up to the second manhole and it was up with about six feet of water, and we put the rods on with a three-prong grappler, and tried to break it from the top, and I told Shanley we would have to go down and rod it, and he said, 'I will go down,' and I said, 'Jim, you better let me go down;' and he said, 'No, you are down often enough.'" Lowery is corroborated in this by one other witness, and it is not disputed, so that it clearly appears that plaintiff's intestate made the choice of who should go down into the hole, and the strongest evidence in the case appears to be that Shanley directed that the ladder, on which he had descended to the bottom, should be withdrawn from the hole. It thus appears that Shanley, an experienced man, not only elected to go into this hole, knowing all of the surroundings, but that he himself directed the removal of the ladder, which would have enabled him to escape.

There was great confusion in the evidence as to just what occurred after the rush of waters began; it is apparent that witnesses on either side of the controversy were greatly excited, and that their recollection of events in their sequence is not at all clear, but the great weight of probable evidence is against the theory on which the plaintiff has recovered. The fellow-servants of Shanley, while disagreeing as to some of the details, appear to have been immediately present, and to have been

Second Department, February, 1912.

[Vol. 149.]

attentive to the details of the work, all of them participating, without orders or instructions from any one, and as we have already pointed out, there is an utter lack of evidence to establish that Lowery was a superintendent within the meaning of the Employers' Liability Act. The master had supplied all of the appliances shown to be reasonably necessary for the work. To have bags filled with sand or manure was not necessary, for the evidence was that there were no breaks in the pipes, and these contrivances were only employed to stop leaks, while the sole object of the employment at the point of the accident was to open the sewer and let the flood waters run through. The fellow-servants were not shown to be incompetent in any regard, and the master having supplied the proper tools and appliances and competent fellow-servants, was not bound to provide a superintendent to see that these tools and appliances were placed in the most advantageous position to be available in the event of an accident, or to hold competent fellow-servants to a point of immediate attention in anticipation of an accident, which, in the ordinary course of events, was not to be expected, for the evidence does not disclose that the work was ordinarily of a hazardous kind, however unpleasant it might be. There being no occasion for a superintendent; there being nothing in the work requiring anything more than competent fellow-servants in its performance, and there having been no assumption of authority on the part of Lowery, who appears to have given way to Shanley, this judgment cannot be supported on the authority of any previous adjudication or by any legislative enactment.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., THOMAS, CARR and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

App. Div.] Second Department, February, 1912.

SAMUEL LARNER, Respondent, v. NEW YORK TRANSPORTATION COMPANY, Appellant.

Second Department, February 16, 1912.

Motor vehicles — negligence — collision with automobile — contributory negligence.

In an action to recover for personal injuries alleged to have been caused by a collision with an automobile the plaintiff stated that he was upon a walk in the middle of the street; that he saw a street car coming thirty-five or forty feet away; that he stepped from the platform to cross the car track and was struck by one of defendant's taxicabs. There was no evidence that the taxicab was being operated negligently; that there was any reason for the defendant's driver to anticipate that any one was going to step down from the platform into his pathway, or that the plaintiff had exercised any intelligent degree of care.

Held, that under such circumstances the case should not have been submitted to the jury.

APPEAL by the defendant, the New York Transportation Company, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered upon the verdict of a jury rendered on the 9th day of June, 1911.

Arthur K. Wing [*George S. Wing* with him on the brief], for the appellant.

Sol. L. Youngen tob, for the respondent.

WOODWARD, J.:

This case never ought to have been submitted to a jury. It is an action to recover for personal injuries, the plaintiff having been injured by a collision with an automobile at or near the New York approach to the Williamsburgh bridge. His own version is that he was upon a walk in the middle of Delancey street, near Norfolk street; that he was looking for a car or wagon along the street railroad tracks; that he saw a car coming thirty-five or forty feet away; that there were no obstructions, and that he stepped down from the platform to cross the railroad track and was immediately struck by one of defendant's taxicabs. There is no evidence that the taxicab

Second Department, February, 1912.

[Vol. 149.]

was being operated negligently; that there was any reason for the defendant's driver to anticipate that any one was going to step down from this platform into his pathway, or that the plaintiff had exercised any intelligent degree of care. He says that he was looking for a trolley car or wagon, that he saw a car approaching thirty-five or forty feet away, but no wagon or automobile, although it is certain, if the automobile struck him as soon as he stepped down from the platform, it must have been between him and the trolley car, and in plain view all of the time. To meet the requirements of the law, one must look with the purpose of finding out, and it is inconceivable that if the plaintiff had looked with this purpose, he should not have seen this taxicab immediately in front of him. All that can be said from the evidence is that the plaintiff was struck by a taxicab and injured. No negligence of the defendant is shown; no freedom from contributory negligence is even fairly suggested by the evidence. Moreover, the learned trial court permitted objectionable testimony over the objection and exception of the defendant, and the case generally was lacking in the elements to establish a legitimate cause of action.

The judgment appealed from should be reversed and a new trial ordered, costs to abide the event.

JENKS, P. J., CARR and RICH, JJ., concurred; THOMAS, J., concurred in result.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

THE PETER BARRETT MANUFACTURING COMPANY, Appellant, v.
FRED VAN RONK, Defendant, Impleaded with EVERETT E.
WHEELER, Respondent.

Second Department, February 16, 1912.

Lien — enforcement of chattel mortgage — priority of lien of livery stable keeper in possession.

In an action brought against the mortgagor and a livery stable keeper in possession to enforce a chattel mortgage lien on a truck it appeared that the mortgagor delivered several horses and trucks to the livery stable

App. Div.] Second Department, February, 1912.

keeper under an agreement whereby he was to pay a certain sum per month for board and storage. Subsequently the mortgagor left the truck in question with the livery stable keeper without any express agreement for its storage. Prior to the commencement of this action the mortgagor took away all but two horses and the truck in question.

Held, that the livery stable keeper was not entitled to retain possession of the truck, on which the plaintiff held a chattel mortgage, for the payment of the board of the horses and storage of other trucks, except for the reasonable charge of storage for the same, as such truck was not included in his agreement for storage;

That he would undoubtedly have a lien upon the entire number of horses and trucks which were delivered to him under the agreement to such an extent that he might hold all or any of them until the payment of all charges.

It seems, that if the truck in question had been a part of the group of chattels originally delivered to the livery stable keeper, and he had, acting in good faith, retained possession of the truck for his debt, he might be entitled to hold it.

APPEAL by the plaintiff, The Peter Barrett Manufacturing Company, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant Wheeler, rendered on the 2d day of May, 1911.

Cyrus V. Washburn [George W. Sickels with him on the brief], for the appellant.

Robert H. Wilson, for the respondent.

WOODWARD, J.:

This action was brought to enforce a purchase-money chattel mortgage lien against defendant Van Ronk, mortgagor, and the defendant Wheeler, a livery stable keeper in possession. Plaintiff sold a single market truck to the defendant Van Ronk for the sum of \$300. The delivery was made on the 6th day of August, 1909, and on that day the defendant Van Ronk executed a purchase-money chattel mortgage, which was duly filed on that day and was duly renewed on the 28th day of July, 1910. On the 1st day of August, 1909, the defendant Van Ronk brought seven horses and harness and four trucks to the defendant Wheeler for board and storage. The rate of board was agreed upon at \$25 per month for each horse, no separate charge being made for the trucks and harness. Prior to the commencement of this action the defendant Van Ronk took away all but two of the horses, harness and one truck, the

Second Department, February, 1912.

[Vol. 149.]

defendant Wheeler surrendering the same. The truck which was left was the one on which defendant Van Ronk had given the chattel mortgage to the plaintiff. On the 1st of December, 1910, the purchase money being unpaid, demand was made for the truck. The truck being in the possession of the defendant Wheeler, a livery stable keeper, the plaintiff, on the 10th day of December, 1910, offered to pay to the defendant Wheeler all his reasonable and proper charges for the keeping and storing of the truck, but the defendant Wheeler refused to surrender the same, claiming a lien thereon for the entire bill contracted by the defendant Van Ronk for the board and storage of the horses and trucks. The only question of law in the case is whether, under the Lien Law, the defendant Wheeler was entitled to retain possession of the truck, on which the plaintiff held a chattel mortgage, for the payment of the debt of the defendant Van Ronk, who was the mortgagor in possession.

It does not clearly appear when the particular truck in question came into the possession of the defendant Wheeler, but it was not delivered to the defendant Van Ronk until the 6th day of August, 1909, at which time the chattel mortgage in question was given, and was duly filed upon that day. This being the case, the truck now under consideration could not have been one of the seven horses and harness and four trucks which were placed in the custody of the defendant Wheeler by the defendant Van Ronk, under an agreement that the defendant Van Ronk would pay to the defendant Wheeler twenty-five dollars per month for the board of each horse, no separate contract being made in reference to the trucks. The rights of the defendant Wheeler, it would seem to us, were determined by the contract of August 1, 1909, five days before the defendant Van Ronk became the owner of the particular truck in question. He would undoubtedly have a lien upon the entire number of horses and trucks which were delivered to him at that time for the board of the seven horses. (Lien Law [Consol. Laws, chap. 33; Laws of 1909, chap. 38], § 183.) We are inclined to the opinion that this lien would attach to the property thus delivered to such an extent that he might hold all or any of such property until all charges for board of the horses and for the storage of the trucks was paid, but the

App. Div.] Second Department, February, 1912.

terms of the statute require, as a condition of any lien upon "any wagon, truck, cart, carriage, vehicle or harness, of any kind or description, stored or kept," that an express or implied agreement shall be made with the owners thereof, whether such owner be a mortgagor remaining in possession or otherwise, "for the sum due him for the care, keeping, boarding or pasturing of the animal, or for the keeping or storing of any wagon, truck, cart, carriage, vehicle and harness, under the agreement," etc. Here there was an express agreement that the defendant Wheeler was to be paid twenty-five dollars per month for each horse, and the lien undoubtedly attached to each horse, and to each harness or truck delivered to the defendant Wheeler on the first day of August. But the truck involved in this litigation was not among the trucks so delivered, for it had not at that time been delivered to the defendant Van Ronk. When on the 6th day of August, 1909, the plaintiff delivered the truck to Van Ronk, it was subject to a chattel mortgage, duly filed, and which gave notice to all of the world of the rights of the plaintiff in such truck. It does not appear that this truck was delivered to the defendant Wheeler with any express agreement as to the amount which should be paid for its storage, though there would probably be an implied agreement to pay the usual charges for such storage. But being delivered at a time subsequent to the contract by which the defendant Van Ronk had agreed to pay twenty-five dollars per month for the board of each one of the seven horses, and when Van Ronk had only a qualified ownership in the chattel, it was not in his power to deal with the truck in a manner to involve it in the indebtedness previously contracted for by him. He could not sell the truck and pay the money over to Wheeler in discharge of his own obligations; he could not give the truck to Wheeler in payment of his own debt, or in discharge of the obligation of the contract. How then could he, by merely delivering this truck for storage, give a lien upon it for the payment of the board and storage of property previously placed in the possession of the defendant Wheeler, and to which the lien had already attached? We think it is entirely clear that the Lien Law never contemplated such a result as this. If the truck had been a part of the group of chattels originally deliv-

Second Department, February, 1912.

[Vol. 149.]

ered to the defendant Wheeler, and he had, acting in good faith, held on to this particular truck for his debt, it might be that he would be entitled to hold it, but, under the circumstances here disclosed, we are clearly of the opinion that there could be no lien attaching to this particular truck, except for the reasonable charge of storage for the same.

The judgment appealed from should be reversed, and the plaintiff should have judgment directing the sale of the chattel and the disbursement of the fund in harmony with this opinion, with costs.

JENKS, P. J., THOMAS, CARR and RICH, JJ., concurred.

Judgment of the Municipal Court reversed and judgment directed for plaintiff, with costs, in accordance with opinion.

WILLIAM H. GOMPERT, Respondent, *v.* PATRICK J. HEALY,
Appellant.

Second Department, February 2, 1912.

Contract — building contract — substantial performance.

Substantial performance of a contract to supervise the erection of a dwelling-house is performance, the only deviations permitted being minor, unimportant, inadvertent and unintentional.

Thus, one alleging substantial performance of such contract cannot recover where, as found by the jury, his failure to require the installation of the plumbing system called for by the specifications deprived him of the right to recover nearly twenty-five per cent of his commissions.

APPEAL by the defendant, Patrick J. Healy, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, rendered on the 20th day of May, 1911, upon the verdict of a jury, for the sum of \$200 and \$24.40 costs.

Humphrey J. Lynch, for the appellant.

Robert S. Kristeller, for the respondent.

HIRSCHBERG, J.:

The plaintiff has recovered judgment in an action brought for services rendered in the supervision of the erection of a house for the defendant upon plans prepared by the plaintiff.

App. Div.] Second Department, February, 1912.

The contract was an entire one and entitled the plaintiff to the sum of ten per cent upon the cost of the dwelling. The ten per cent amounted to the sum of \$780 and one-half of this sum had been paid to the plaintiff before the action was brought. The action was brought to recover the balance of \$390, and the verdict of the jury was reached by deducting the sum of \$190 for damages occasioned by failure of performance on the part of the plaintiff in permitting a plumbing system to be installed which deviated in many essential particulars from those required by the plans and specifications.

The action is brought on an allegation of entire performance, and as the learned counsel for the respondent states in his brief, "the only material question of law involved is whether there was a substantial performance of the contract sufficient to have permitted a recovery upon an allegation of performance of the contract." It seems quite clear that this question of law must be resolved against the contention of the respondent. Substantial performance is performance, the deviations permitted being minor, unimportant, inadvertent and unintentional. In this case, by the verdict of the jury it has been decided that the omissions were substantial, being sufficient to deprive the plaintiff of a right to recover nearly twenty-five per cent of the contract price.

In *Lashinsky v. Silverman* (48 Misc. Rep. 501) it was held by the Appellate Term that where a contractor had failed to comply with the terms of his agreement to an extent represented by ten per cent in some particulars and fifteen per cent in others, he had failed to show substantial performance of his undertaking and could not recover. In *Ketchum v. Herrington* (45 N. Y. St. Repr. 59) it was held that defects in construction which would exceed one-third of the contract price were inconsistent with a finding of substantial performance and would not support a conclusion that the plaintiff was entitled to recover. To the same effect is the case of *Spence v. Ham* (27 App. Div. 379; affd., 163 N. Y. 220).

The judgment must be reversed.

JENKS, P. J., BURR, CARR and RICH, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

CORNELIA KELLUM, Respondent, *v.* ALICE J. CORR and Others, Respondents, Impleaded with THE MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN, Appellant.

Second Department, February 16, 1912.

Partition — determination of rights of adverse holder — appeal — reversal on specific issue — judgment in action of ejectment — *res adjudicata* — new trial — evidence — presumption — lost grant — twenty years' possession essential — computation of period — interruption of adverse possession.

An action for partition may be maintained even when the premises are held adversely. The right, title and interest of the adverse holder may be determined in the action as an incident to the main relief of partition.

The fact that a judgment has been reversed on appeal because of an error in the exclusion of evidence does not mean that the appellate court considered all other points of attack untenable.

Where a judgment for the plaintiff in an action of ejectment which had been directed by the Appellate Division was vacated on payment of costs by the defendant under the then existing statutory right for a new trial in such action, the judgment was not *res adjudicata* as to the issues. But, *it seems*, that so far as the same questions of law are involved it was decisive as to the law of the case.

In order that there may be a presumption of a lost grant arising through an open possession of lands for over twenty years, it is not necessary to prove circumstances indicating the probability that a grant was actually made. The presumption exists where the circumstances indicate only a possibility of a grant.

The time of possession of lands necessary to support the presumption of a lost grant cannot, under the law of this State, be less than twenty years.

Even assuming that trustees intended by implication to include in a conveyance lands which they were unable to convey, a title cannot be claimed thereunder where the deed itself gave no title and it is not shown that the grantee ever entered into possession claiming under the deed.

Where adverse possession though begun more than twenty years before an action of partition was not continuous, but was interrupted by the possession of another person against whom an unsuccessful action of ejectment was brought, a subsequent adverse possession cannot be tacked on to the prior possession in order to fill out the twenty years' possession required by the statute.

App. Div.] Second Department, February, 1912.

APPEAL by the defendant, The Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 11th day of November, 1910, upon the report of a referee.

Austen G. Fox [Theodore De Witt with him on the brief], for the appellant.

Charles S. Noyes, for the respondents.

CARR, J.

This is an appeal from an interlocutory judgment in an action of partition, which defined the respective rights in the land in question that were vested in various of the parties to the action. The land is situated at Rockaway Beach, in Queens county. The complaint sets forth the alleged title of the plaintiff, and the titles and the respective interests of the various defendants. It was claimed in the complaint that the defendant Mission of the Immaculate Virgin was in possession of the larger part of the premises described therein, and held the same adversely, but without legal title or interest therein as against the plaintiff and the other defendants, and a judgment was asked declaring the said defendant to be without legal right or title to the premises sought to be partitioned. The defendant Mission of the Immaculate Virgin set up a claim of title adverse to that of the plaintiff and the other defendants, and asks for a dismissal of the complaint. No issues of fact were framed for trial by a jury, but a stipulation was entered into by all the parties to the action consenting to the entry of an order appointing David B. Ogden, Esq., referee to hear and determine. After taking the voluminous proofs which appear in the record on this appeal the learned referee wrote a somewhat elaborate opinion, in which he held that the defendant Mission of the Immaculate Virgin had no title or interest in the premises in question, and directed judgment accordingly. After the filing of this opinion very extensive findings of fact were made by the referee on the request of the plaintiff, and somewhat extensive requests to find made by the defendant Mission of the Immaculate Virgin were passed upon by the referee. Judgment was entered in

Second Department, February, 1912.

[Vol. 149.]

accordance with the findings of the referee in favor of the plaintiff, and from this interlocutory judgment the defendant Mission of the Immaculate Virgin has appealed to this court.

The last question discussed in the somewhat elaborate brief of the appellant is the first question that should be considered in order. It is urged by the appellant that the right, title and interest of the defendant Mission of Immaculate Virgin, which was in adverse possession of the premises in question as against all other parties to the action, could not be determined properly in an action of partition, and that, therefore, the complaint should have been dismissed. There are numerous decisions of recent date, some of which had been made by this court, in which it has been held that an action in partition may be maintained even when the premises are held adversely and that the right, title and interest of the adverse holder may be determined in such an action as an incident to the main relief of partition. (*Lawrence v. Norton*, 116 App. Div. 896; *Leidenthal v. Leidenthal*, 121 id. 269; *Johnson v. Aleshire*, 130 id. 178.)

Whatever title the parties to this action may possess originated in a common source of title. The land in question had been covered by a partition action in Queens county, which was brought in 1809 and which is generally referred to throughout the record as the Cornwell partition action. This land was owned originally by parties named Cornwell and a party named Josiah Martin. Josiah Martin died long prior to 1809 and devised his interest in the land to his son, Samuel Martin, who likewise died prior to 1809. Samuel Martin devised all his real estate to his two sisters, Alice Martin and Rachel Banister. In the partition action of 1809 an actual partition was had of the real estate covered by the suit. In that action it was adjudged that Rachel Banister and her husband, Thomas Banister, were seized of two undivided sixteenth parts of the property in question and that Alice Martin was seized of a like interest. Commissioners were appointed to make actual partition, and maps were prepared and acted upon by said commissioners. The land covered by this ancient action was situated at Rockaway Beach and consisted of beach land and marsh land. The commissioners on their maps divided the beach land into two divisions which they called the first and second divisions of the

App. Div.] Second Department, February, 1912.

beach. These divisions were again subdivided into plots which were numbered respectively. In the actual partition made by the commissioners Rachel and Thomas Banister were awarded lots 6 and 7 in the first division of the beach and lots 4 and 5 in the second division of the beach. These lots 4 and 5 of the second division of the beach embrace the land in controversy in this action. Alice Martin was allotted lots 4 and 14 of the first division of the beach and lots 12 and 13 of the second division of the beach and other land known as lots 13 and 14 of the division of the marsh, etc.

The plaintiff in this action and the other defendants, excluding the defendant Mission of the Immaculate Virgin, claim title to the land in question as descendants of or successors in interest of Rachel Banister, to whom an allotment was made in 1809. So far as the question of descent is concerned or succession by mesne conveyances there is no controversy in the case.

While there is a very elaborate presentation of the controversy in the respective briefs, it may be stated summarily as follows: The plaintiff claims that she and her cotenants have made out a *prima facie* case by showing title in Rachel Banister, and descent or succession from her. The appellant claims that it has made out a title by showing an intermediate acquisition, either by actual grant or by presumption of grant from Rachel Banister, deceased. When the plaintiff rested in her proofs she had made out concededly a *prima facie* title by descent from Rachel Banister. The appellant contends, however, that the proofs given by it on the defense established either an absolute title in itself from the original source of title or show such circumstances as to create a presumption in law that the plaintiff's alleged predecessors in title had in the course of time by grant or otherwise become divested of all title in the premises, and that, therefore, the plaintiff and her alleged cotenants were without legal right to maintain the present action as against the appellant, which was in actual possession of a greater part of said premises under a hostile claim of title.

The controversy as to the title to this land has been before the courts quite frequently and in various forms.

Second Department, February, 1912.

[Vol. 149.]

The respondents contend that all the questions of law involved in the issues have been settled against the appellant by the decisions in the following cases: *Mission of Immaculate Virgin v. Cronin* (143 N. Y. 524); *Kellum v. Mission of Immaculate Virgin* (82 App. Div. 523; 129 id. 921).

Before passing to a consideration of the merits of this appeal the effect of these prior decisions should be considered briefly. The *Cronin* case is authoritative on several important branches of the present action, but does not cover it entirely, for the reason that there is now before the court proof of a series of facts which were not then in evidence or under consideration in any way.

That action was one in ejectment in which the then plaintiff had to rely upon its own proofs of title, and it was held that such proofs as it had offered did not make out title either by actual grant or presumption of a lost grant, or by adverse possession. *Kellum v. Mission of Immaculate Virgin* was likewise an action in ejectment, and on the first trial thereof before a jury a verdict was directed against the defendant and judgment entered accordingly. On an appeal to this court that judgment was reversed, on the specific ground of an error of the trial court in the exclusion of evidence. The reversal of a judgment on one specific point does not mean that the appellate court has considered all other points of attack untenable. On the second trial of the *Kellum* ejectment action a verdict in favor of the plaintiffs was again directed by the trial court with a direction that the exceptions should be heard in the first instance in this court. On the hearing of the exceptions in this court, they were overruled and judgment was directed for the plaintiffs (129 App. Div. 921). No opinion was written, however. The judgment so entered was vacated on payment of costs by the defendant under its then statutory right for a new trial in an ejectment action, and it does not constitute *res adjudicata* as to the issues. Doubtless, so far as the same questions of law are involved, it should be considered as decisive as to the "law of the case." An examination of the record on appeal in that case and a comparison of them with the record in this case shows that the proofs are very largely the same. It is urged, however, by the appellant here that

App. Div.] Second Department, February, 1912.

the proofs of the mission in the former cases have been supplemented in this action by additional proofs of great importance to such extent as to present the controversy in this action in a somewhat fresh aspect. Whether this be so the learned referee proceeded to consider and determine the case without regard to any decisive effect of the decisions in the Kellum ejectment action, and in considering this appeal we shall do the same.

Whatever record title the appellant has came by grant from Charles Donohue and wife by deed dated January 6, 1881. Charles Donohue was the grantee in a deed executed by Benjamin C. Lockwood and others, dated January 28, 1869. This last deed recited that the grantors were the widow and son and only heir at law of Benjamin C. Lockwood, deceased. The instrument further recited that the land described therein was formerly owned by Benjamin Cornell and that he devised the same by his will to his grandson, Benjamin C. Lockwood, deceased. It appears in the proofs that this Benjamin C. Lockwood, the elder, died on October 9, 1838. The recital in this deed as to the source of Benjamin C. Lockwood's title through a will of Benjamin Cornell is apparently unsupported by any proofs, for, as it appears in this record, if he ever acquired any title to these lands, it must have been under a deed to him from Robert Bogardus and James Foster, as trustees, dated March 12, 1832. The description in this last-mentioned deed describes the land conveyed as beach lots 6 and 7, but also contains general words of location which the appellant contends would relate really to beach lots 4 and 5 and thus make the deed applicable to the lands in controversy by the exclusion of the numbers of the beach lots as expressed in the deed as being mere clerical errors. Bogardus and Foster made their grant expressly under the powers given to them by a certain trust deed from Thomas Banister and others. Here comes the crucial point of controversy in this case. Did this trust deed embrace the lands now in controversy? The appellant contends that it did, while the judgment below is based upon the theory that it did not.

The Thomas Banister of the trust deed was the husband of Rachel Banister of the partition action of 1809, who was the

Second Department, February, 1912.

[Vol. 149.]

allottee of beach lots 4 and 5. The other grantors were children of Rachel Banister, then deceased. The fee to beach lots 4 and 5 was in some of these grantors in undivided shares, and the right of possession of the whole of the premises was in Thomas Banister as tenant by courtesy. The question is, did they convey this beach land in their deed to Bogardus and Foster as trustees. This trust deed is dated July 24, 1818. The land conveyed is described therein as follows: "All that Certain Farm, Mansion House, outhouses, Woodland, Meadow, Ground and premises situate, lying and being at Far Rockaway, in the Township of Hempstead, County of Queens and State of New York, commonly called Rock Hall, including the piece of land purchased from Whitehead Cornell, the piece purchased from Stephen Wood, the piece purchased from Micajah Mott and the piece purchased from James Abrams, and whereof Samuel Martin, late of Rockaway, aforesaid, physician, died seized. Containing in the whole by Estimation Four Hundred Acres of Land, all of which the said Samuel Martin devised to his two Sisters, Rachel Banister, the wife of the said Thomas, and Alice Martin, deceased, the undivided moiety which belonged to the said Alice Martin was by deed duly executed and bearing date the twelfth day of September, One thousand Eight Hundred and seventeen, conveyed to the said Thomas by Robert Bogardus and Allice McNeil, in Virtue of Will of the said Alice Martin and to which will they were Executors."

There was a well-known estate or farm known as Rock Hall which was situate over two miles away from beach lots 4 and 5 and which was not embraced within the Cornwell partition of 1809, as it was not owned in common by the parties to that action. This trust deed recites the purposes of the trust. It recites also that Thomas Banister is seized in fee of an equal undivided moiety of the lands described therein and that he is possessed of another equal undivided moiety as a tenant by courtesy. These recitals did not fit, apparently, his interest in beach lots 4 and 5, for in them he was possessed of a tenancy by courtesy in the whole and was not seized of any equal moiety or other estate in fee. The recitals, however, would accurately fit the situation by declining to consider

App. Div.] Second Department, February, 1912.

the description as applying by implication to beach lots 4 and 5 of the Cornwell partition. There is no express application in the trust deed to such beach lots, and there can be no implied application unless ownership of said beach lots had been in some way divested from Rachel Banister and vested in her sister, Alice Martin, and then treated by Alice Martin as a part of the Rock Hall farm. There is no direct proof of such a transfer. That much is indisputable. The appellant contends, however, that the surrounding circumstances and subsequent actions of the parties to the trust deed were such as to raise a presumption of a grant from Rachel Banister to Alice Martin of the beach lots which had been allotted to Rachel Banister. Alice Martin died in 1815 and Rachel Banister died in 1817. The appellant introduced a large amount of such proof in an endeavor to support the presumption of a lost grant from Rachel Banister to Alice Martin. No proof was produced to show any open use or possession of these beach lots by Alice Martin. Because of the lapse of time the impossibility of producing testimony of living witnesses and the absence of relevant documents, the failure to give such proof may be understood, whatever were the actual facts. So far as the appellant's proofs went on this point, they were undisputed, and all the established facts were found by the referee, who refused, however, to find as facts the inferences of further facts which the appellant claims should have been drawn from the established facts set forth in its proofs.

Briefly stated, these proofs go to show that the trustees Bogardus and Foster subsequently acted as if their trust deed covered also the beach lots which had been allotted to Rachel Banister in 1809, and made conveyances of parts thereof to various grantees, and that some of such grantees had in turn conveyed and that as to some of such lands there is now and has been for a great period of time open and undisputed possession under a claim of title springing from the conveyances of said trustees. It is further shown that the trustee Bogardus was a reputable lawyer of New York city; that the trust deed was in his own handwriting; that he was the executor of Alice Martin, and had made a conveyance to Thomas Banister as such executor of an undivided moiety of the Rock Hall farm or estate.

Second Department, February, 1912.

[Vol. 149.]

From all of these facts it is argued that it must be presumed that Bogardus and his cotrustee must have known of the existence of a grant from Rachel Banister to Alice Martin covering Rachel's allotment of 1809, or otherwise their subsequent acts in making conveyances of such beach lots under the trust deed is unintelligible. If the trust deed did not cover these beach lots of Rachel, then such acts of the trustees are clearly unintelligible unless the trustees acted ignorantly and negligently. Can the presumption of a lost grant be indulged in in order to hold that the trustees acted knowingly and within their trust powers?

The doctrine of our law in relation to the presumption of a lost grant came to us from England. It has been applied frequently in this country in various reported cases. To give it application it is not necessary to prove circumstances which indicate the probability that a grant was actually made; it may be applied where the circumstances indicate only a possibility of an actual grant. (*Fletcher v. Fuller*, 120 U. S. 534, and cases cited.)

Before it can be applied, however, there must be shown open actual possession in the presumed grantee of such a nature as to be indicative of exclusive ownership and likewise continuous over a long number of years. The doctrine arose in England at a time when there were no recording acts and no statute of limitations as to adverse possession of real property. The public necessity of protecting titles arising out of open actual and adverse possession of real property over a long term of years gave rise to the fiction of a presumption of a lost grant, as the English law had not then adopted, if ever since, the rule of Roman law as to title by prescription, and there was, when this legal doctrine came into active play, no other method under the English law by which title to real property might be acquired except in a manner resting ultimately upon some form of a grant.

Open possession was the essential element on which the doctrine rested, and this possession was required, at first, to be from "time immemorial." At the end of the eighteenth century the English courts had formulated a rule that open possession for twenty years was sufficient to presume the exist-

App. Div.] Second Department, February, 1912.

ence of a "modern lost grant." (Markby Elem. Law [6th ed.], 272-278.)

In this State it has been quite recently declared that the time of possession necessary to support the presumption of a grant must not be less than the period fixed by statute for the adverse possession which ripens into title, that is, twenty years. (*Mission of Immaculate Virgin v. Cronin*, 143 N. Y. 524, 527.) There are many earlier cases in this State on the rule of the presumption of a lost grant, but, in all of them, the presumption was indulged in only in relation to an adverse possession of twenty years or more.

There was, therefore, little, if any, room for a finding by the referee that Alice Martin had become vested with the title to beach lots 4 and 5 by grant from Rachel Banister, unless it be that such presumption of grant can be indulged in to reconcile the acts of Bogardus and Foster under their trust deed. A legal presumption of a lost grant has never been based upon such circumstances, at least there is no authority cited or to be found which asserts such a rule. The appellant's counsel, with close reasoning and great dialectical skill, discusses a great number of attendant circumstances in support of his contention which, while we do not particularize them here, we have examined in detail, and, we trust, with due care. Unless Alice Martin had acquired title to the beach and other lots which had been allotted in 1809 to Rachel Banister, it seems reasonably clear on the record before us that the trustees Bogardus and Foster had no title thereto. Assuming, however, for the time being, that the trustees, when they conveyed to Lockwood the elder certain beach lots described as 6 and 7, did intend to convey beach lots 4 and 5, the situation is not improved for the appellant. For the deed by itself gave no title, and there is nothing to show that its grantee ever entered upon these premises and exercised acts of possession, claiming under the deed. The deed to him from the trustees is dated March 12, 1832, and he died intestate in 1838, leaving a widow and a son, Benjamin C. Lockwood, Jr. The referee has found that as early as 1854 there was a grove of cedars on this land and that the younger Lockwood, in that year, had sold cedars from the

Second Department, February, 1912.

[Vol. 149.]

premises to one Andrew Brady for use as fence posts on land elsewhere situated; and that, prior to 1864, the premises were known to people residing in the neighborhood as "Lockwood's Cedars," or "Benjamin Lockwood's Cedars;" and that from 1850 to 1869 the lands were useful and valuable because of the presence of the cedars and their adaptability for use as fence posts. It was likewise proved that Donohue, after 1869, frequently cut therefrom cedars for use as fence posts on his property elsewhere situated. The land, however, was never inclosed by fences, though its boundary lines were staked and monumented. It was practically a barren stretch of sandy sea shore, and it did not appear upon the assessment lists of the town until 1881. Its nature did not adapt it to cultivation and there was none. This situation is the same, however, as was presented by the record on appeal in *Mission of Immaculate Virgin v. Cronin (supra)*, where it was held by the Court of Appeals that these facts were not sufficient to show such possession as would constitute an adverse possession, or to form a basis upon which could rest a presumption of a lost grant to the Lockwoods from the Banisters. So far as the facts established are practically the same, we think this court is bound by the decision in *Mission of Immaculate Virgin v. Cronin (supra)*. If the appellant, or its grantor Donohue, or his grantors, the Lockwoods, had been in actual adverse possession continuously for twenty years before the bringing of this present action, there could be no question as to its title, but the adverse possession of the appellant, though begun more than twenty years before this bringing of this action, was not continuous, as it was interrupted by the hostile possession of one Cronin, who went into possession in 1887, and against whom it had brought unsuccessfully an action in ejectment. Thereafter, in 1901, Cronin went out of possession and the appellant again went in, but the time of possession antecedent to Cronin's hostile possession cannot be tacked to the time when the present possession began in order to fill out the time required by statute for adverse possession to ripen into title. (*Bliss v. Johnson*, 94 N. Y. 235; 1 Cyc. 1000.)

This case abounds in troublesome and complicated questions, as is apparent from the continuous litigation which has arisen

App. Div.] Second Department, February, 1912.

concerning these lands. The argument presented to this court on this appeal has been so detailed and so elaborate as to require patient examination and thoughtful care as to the numerous points advanced. In this opinion we have discussed but the main features of the case, but we have not overlooked any of the cumulative or incidental arguments advanced. We think we should not be justified in rejecting the findings of the referee as against the weight of evidence to reverse the interlocutory judgment entered thereon.

The interlocutory judgment is affirmed, with costs.

JENKS, P. J., THOMAS, WOODWARD and RICH, JJ., concurred.

Interlocutory judgment affirmed, with costs.

C. ADELBERT BECKER, Appellant, *v.* MAGGIE MCCREA and LUCILLE CLARK BECKER, Appellants, Impleaded with ANNIE BREVOORT EDDY and Others, Respondents.

Second Department, February 28, 1912.

Partition — pleading — claim of ownership by adverse possession and rights as mortgagee in possession — mortgagee in possession not deprived thereof until mortgage paid — payment of mortgage prior to distribution of proceeds in action of partition — evidence — payment — presumption.

Although defendants in an action of partition claim ownership by adverse possession, their rights as mortgagees in possession after default can be determined if that right is also asserted by answer.

A mortgagee lawfully in possession after default of the mortgagor will not be deprived of possession until the mortgage has been paid; the possession need not have been given under the mortgage nor with a view thereto.

The right of a mortgagee lawfully in possession after default to have the mortgage paid prior to the distribution of proceeds in an action of partition, may be established upon very slight evidence.

Where a mortgagee is lawfully in possession after default, there is no presumption of payment of the mortgage arising after the expiration of twenty years.

APPEAL by the plaintiff, C. Adelbert Becker, and the defendants, Maggie McCrea and another, from a judgment of the

Supreme Court in favor of certain of the defendants, entered in the office of the clerk of the county of Westchester on the 2d day of August, 1910, upon the decision of the court rendered after a trial at the Westchester Trial Term, a question of fact having been submitted to the jury, and also from an order entered in said clerk's office on the 20th day of July, 1910, denying the appellants' motions for a new trial made upon the minutes.

Charles H. Tuttle, for the appellant Maggie McCrea.

Harlan F. Stone, for the plaintiff, appellant, and *Munson & Roberts*, for the appellant Lucille Clark Becker, adopting the brief of the appellant Maggie McCrea.

J. Addison Young [*William S. Beers* with him on the brief], for the respondents.

HIRSCHBERG, J.:

This case has been tried three times, the first two times without a jury, and on the present occasion with a jury, at the request of the appellants. There appears to be no difference in the facts as elicited on the different trials, and the only questions presented are of law.

The action is brought for the partition of certain real estate in the county of Westchester, which was owned in 1877 by Jane B. Eddy, now deceased. In that year she conveyed the property to one Bernard Spaulding and took back a purchase-money mortgage. Spaulding conveyed the property the same year to the defendant Maggie McCrea, subject to the incumbrance. The next year an action was brought by Mrs. Eddy to foreclose the mortgage, which action was prosecuted to judgment, but no sale was had thereunder. In the year 1879, after the entry of the foreclosure judgment, Mrs. Eddy took possession of the property, and she and her devisees, who are now made defendants in this action, have ever since occupied it, cultivating the land, raising and using the crops and building a barn for use upon the premises. No accounting has been had or asked for, and it may possibly be assumed, therefore, that the occupation of the property is deemed to have been profitless.

App. Div.] Second Department, February, 1912.

After a period of twenty-five years of such open and undisputed possession had elapsed the defendant Maggie McCrea conveyed an undivided part of the premises to the plaintiff, and this action was then brought by him in partition. Mrs. Eddy died the next year, and her devisees and the executors and trustees of her will, upon whom her title devolved, were then made parties defendant. They answered the complaint in substance as Mrs. Eddy had done, the devisees claiming to own the premises in fee, subject to the trusts and provisions contained in the will, and setting up adverse possession in the testatrix and themselves for a period of more than twenty years.

On the first trial the court found that Mrs. Eddy as mortgagee had entered into possession of the property with the express knowledge and assent of the owner, and that such possession as mortgagee for more than twenty years was adverse, and was sufficient to support the judgment then rendered, dismissing the complaint on the merits and adjudging the title in her devisees as tenants in common. The judgment was affirmed by this court (*Becker v. McCrea*, 119 App. Div. 56), but was reversed by the Court of Appeals (193 N. Y. 423) on the ground that inasmuch as possession by a mortgagee can only be with the consent, express or implied, of the owner of the equity, it could not be in hostility to the legal title, and, therefore, could not be adverse. The judgment entered on the second trial was vacated for a defect of parties.

On the last trial, now under review, the court submitted to the jury a question agreed upon by the parties, namely, "From 1888 to April, 1904, did Mrs. Jane B. Eddy continually hold possession of that fifteen-acre parcel described in the Spaulding mortgage as a mortgagee in possession under that mortgage?" which question the jury answered in the affirmative.

The judgment appealed from decrees partition of the property, but requires the payment of the mortgage prior to the distribution of the proceeds.

The main point raised by the appellants is that as the answer of the Eddy defendants claimed ownership by adverse possession, the question of their possession under the mortgage

could not be lawfully submitted to or passed upon by the jury. Undoubtedly the Eddys claimed to own the property, yet I think they were entitled under the terms of the answer to insist upon their rights as mortgagees in possession. The learned counsel for the appellants asked the court to rule, after the Eddy defendants had rested, that the answer set up only the claim of mortgagee in possession, to which request the court ruled that the answer might be regarded as setting up both claims, but subsequently the court required an election, in response to which ruling the respondents elected to limit their claim to their rights as mortgagees in possession. In *Madison Ave. Baptist Church v. Oliver St. Baptist Church* (73 N. Y. 82, 94) the court said: "It is ordinarily sufficient that a mortgagee is *lawfully* in possession after default upon the mortgage. The court will not then deprive him of the possession until his mortgage has been paid. *The possession need not be given under the mortgage, nor with a view thereto.*" This doctrine was expressly approved in the recent case of *Barson v. Mulligan* (191 N. Y. 306), the court saying (p. 321): "It is to be noted, moreover, that this court seems to be committed to the doctrine that the mortgagee's possession 'need not be given under the mortgage, nor with a view thereto.'" It seems to be well settled that very slight evidence is sufficient to establish the claim of a mortgagee lawfully in possession of the property, and it cannot be said that the verdict of the jury in this instance is against the weight of evidence.

The appellants claim that the mortgage has been paid by the lapse of time; in other words, while there is no claim of actual payment, that a presumption of such payment arises after the lapse of twenty years. This contention necessarily falls with the determination that the Eddys were in possession as mortgagees. This appears to be conceded by the appellants. Subdivision 1 of point 2 in their brief states that "*Unless Jane B. Eddy was a mortgagee in possession at the time of the commencement of this action, there was then a conclusive presumption of law that the mortgage was paid.*"

There are other questions presented on the appeal which have been examined and are not deemed to require minute dis-

App. Div.] Second Department, February, 1912.

cussion. The result reached appears to be just and equitable, and nothing is found which compels a reversal.

The judgment and order should be affirmed.

JENKS, P. J., WOODWARD and RICH, JJ., concurred; BURR, J., not voting.

Judgment and order affirmed, with costs.

HERMAN J. MEYERS, Respondent, v. NORTH AMERICAN WATCH COMPANY, Appellant.

Second Department, February 16, 1912.

Process — service upon corporation — Municipal Court Act construed — service upon sales agent insufficient.

Section 31 of the Municipal Court Act, providing for the service of summons upon a corporation by delivering a copy to its "managing agent" means that such agent shall be a general manager of the affairs of the corporation as distinguished from a mere agent of limited authority. Hence, service upon a person who, being merely sales agent of a foreign corporation, solicited orders by sample in this State for transmission to his corporation, is not good service upon the corporation.

APPEAL by the defendant, the North American Watch Company, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, rendered on the 31st day of March, 1911, by default.

Harry J. Rosenson, for the appellant.

Scott & Follette, for the respondent.

WOODWARD, J.:

This action was brought to recover the purchase price of certain goods, and the only question presented by this appeal is whether the court had jurisdiction of the defendant. Judgment was taken by default, the defendant refusing to plead, it being contended by the defendant, who appeared specially for that purpose, that there was never a valid service upon the defendant, a foreign corporation, doing business in the State of Ohio. Section 31 of the Municipal Court Act (Laws of 1902, chap. 580) provides that in the service of the summons, "If an

Second Department, February, 1912.

[Vol. 149.]

action be against a corporation, by delivery of a copy to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof, but when no such officer resides in the city, to a director resident therein." The language of this act clearly contemplates that the "managing agent" shall be in the nature of an officer of the corporation, and not a mere agent for particular purposes, for after enumerating the officers, including the "secretary, cashier, or managing agent thereof," it provides that if "no such officer resides in the city," then the service may be made upon a resident director. It is not merely that he is a "managing agent," but he must be a "managing agent thereof," meaning of the corporation. In other words, the managing agent contemplated in the statute is a general manager of the affairs of the corporation, as distinguished from a mere limited agent of the corporation in the transaction of particular business.

The affidavit of service in the present case sets forth that the person serving the summons knew the person so served to be the managing agent of the defendant corporation, but it clearly appears from the matters submitted upon a traverse of the return, where the defendant appeared specially for the purpose of raising the question, that the so-called "managing agent" of the corporation was merely a salesman employed by the defendant, who solicited orders in the city of New York and transmitted them to the defendant at Mansfield, O. The defendant furnished this salesman desk room in an office, and supplied him with samples, but beyond this the defendant did not conduct business within the State of New York; it merely sold goods by sample, and there is not the slightest ground for believing that this salesman held any official relation to the affairs of the corporation, or had any authority to represent it in any discretionary matters. He was certainly not a "managing agent" of the corporation, and it was error to hold such a service to confer jurisdiction upon the Municipal Court.

The judgment appealed from should be reversed.

JENKS, P. J., THOMAS, CARR and RICH, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

App. Div.] Second Department, February, 1912.

ANNA V. HINTZE, as Administratrix, etc., of OTTO W. HINTZE, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Second Department, February 16, 1912.

Evidence — negligence — negative testimony — failure to ring bell — railroad — death of brakeman — proof justifying recovery.

Although both the engineer and fireman of a locomotive which ran over and killed the plaintiff's intestate testify positively that at the time an automatic bell was ringing, the jury may find to the contrary on the negative testimony of witnesses if they were so close to the place of accident at the time that they could have heard the bell if it had been ringing.

Action against a railroad company to recover for the death of a patrolman who while engaged in inspecting a third rail system at a point where the track was curved was run down and killed by the defendant's locomotive. Evidence examined, and held, that a verdict for the plaintiff based on a finding that the defendant was negligent and the decedent free from contributory negligence should be affirmed.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 15th day of February, 1911, upon the verdict of a jury for \$9,000, and also from an order entered in said clerk's office on the 14th day of February, 1911, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Brown, for the appellant.

Abram F. Servin and Rosslyn M. Cox, for the respondent.

CARR, J.:

The defendant appeals from a judgment of \$11,064.07 in an action to recover damages for the death of the plaintiff's husband through the negligence of the defendant. The case was here before and a judgment in favor of the plaintiff was reversed (140 App. Div. 852). That reversal was based upon grounds which do not apply to the present judgment, for on the first trial it was left to the jury to find negligence on the

part of the defendant from the conduct of a fellow-servant who was held by this court not to be a vice-principal within the meaning of section 42a of the Railroad Law (Gen. Laws, chap. 39 [Laws of 1890, chap. 565], as added by Laws of 1906, chap. 657.)

The decedent was a strong, healthy man of thirty-two years and was employed by the defendant as a "patrolman" on its third rail electrical system in the neighborhood of Yonkers. His wages were seventy-five dollars a month. On the afternoon of October 20, 1908, about four-thirty o'clock, he was struck by a steam train of the defendant and killed. When so struck, he was apparently between tracks, bending forward doing some kind of work on the third rail track and facing westward towards the river, in the Yonkers yard of the defendant. The negligence charged against the defendant is that its engineer ran the steam train through the yard at a high rate of speed, without giving any signals by bell or whistle, although it was his duty to anticipate the presence of workmen on the tracks and to warn them, whenever he saw them, by sharp, short blasts of the whistle. It is not disputed that no whistle was blown, both the engineer and the fireman so admit and a half dozen witnesses for the plaintiff so testify. The excuse offered by the engineer for not blowing the whistle is that when he discovered that the decedent was on the tracks, the distance was too short to use the whistle, and all that could be done was to put on the emergency brake, which was done, but in vain. The engineer (Signer) testified that he first learned of the decedent's presence on the tracks by a shout from his fireman (Robinson) at a time when the train was about thirty-five feet from the decedent. He testified that he had kept a lookout ahead and failed to see the man on the tracks because his train was running on a curve and he could not see straight ahead for any distance. Both he and the fireman testified that the train had given warning by an automatic bell which had been set ringing some considerable distance away and which was still ringing when the man was killed. The rules of the company required the engineer to give warning by whistle whenever he saw any one on the tracks, and likewise required him to keep a lookout for such

App. Div.] Second Department, February, 1912.

persons. There was some question whether the engineer had not testified on the first trial that he could see nearly a quarter of a mile ahead at a place shortly below the point where the accident happened. On the second trial, however, he denied the possibility of such a view, and explained or sought to explain what he meant by his former testimony. The testimony of the engineer and fireman as to the ringing of the bell is negatived by all the witnesses for the plaintiff who were at or near the scene of the accident. Some of these were not more than forty feet away when the man was struck, several of them had seen the man at work just before he was struck, and one of them (Bartell) saw the accident happen. All of them were in places where they could have heard the bell if it was ringing.

The defendant urges that their negative testimony cannot be allowed to prevail over the positive testimony of the engineer and fireman, and cites *Culhane v. N. Y. C. & H. R. R. Co.* (60 N. Y. 133) and *Foley v. N. Y. C. & H. R. R. Co.* (197 id. 430) that under these circumstances it was error to submit such question to the jury. In answer to this point the plaintiff cites *Greany v. Long Island R. R. Co.* (101 N. Y. 419). These authorities leave this question in a vexed and unsatisfactory condition. It seems to us, however, that where witnesses who are near by the train, and so situated that they could not escape hearing the bell had it rung, testify that they did not hear, an issue is raised for the jury even in face of the positive testimony of the engineer and fireman that the bell was ringing. The rulings in the *Culhane* and *Foley* cases should not apply to the testimony of witnesses who were well placed to observe the physical phenomena and whose testimony shows generally an active observation thereof. It seems to us that a fair case was made out for a determination by the jury as to the negligence of the defendant on this point.

The next question is as to the absence of contributory negligence on the part of the decedent. It appears that he was doing some kind of work on the third rail, in a stooping position, facing the river. There is no real dispute as to this fact. The rules of the defendant required him to face the traffic. Apparently he did not obey this rule, and there is no evidence

Second Department, February, 1912.

[Vol. 149.]

that he kept any outlook for an oncoming train. There were some peculiar circumstances that existed which might have justified his failure to maintain a personal lookout. He was working in company with another patrolman, one Flynn. The custom, based upon instructions from superiors, was that when one patrolman was working the other should keep a lookout. The decedent was working on the track, in a stooping position; Flynn was seen by various witnesses to walk away. He gave no warning of the oncoming steam train. The court left it to the jury to say whether it was negligent for the decedent to rely upon Flynn to keep a lookout and give warning. It seems to us that this was proper enough and that no error was made in submitting this question to the jury.

We see no reason why we should disturb the finding of the jury on the facts, nor do we find any rulings of law which seem to me erroneous.

The judgment and order should be affirmed, with costs.

Present — JENKS, P. J., THOMAS, CARR, WOODWARD and RICH, JJ.

Judgment and order unanimously affirmed, with costs.

W. TYRIE STEVENS, Plaintiff, *v.* GUSTAV AMSINCK and Others, Defendants.

Second Department, February 28, 1912.

Contract — offer and acceptance — expression of intention — when offer question for jury — breach — damages — reversal for failure to allow nominal damages — substantial damages — evidence — profits — losses — measure of damages — evidence of damage.

The question as to whether a statement of intention by parties negotiating a contract and the attending circumstances are such as to authorize the other party to act upon them as an offer is a question of fact for the jury.

If the statement of intention by the promisor is susceptible of more than one meaning, it should be interpreted in the sense in which he had reason to expect that it was understood by the promisee, and this also is a question for the jury.

App. Div.] Second Department, February, 1912.

Action for the breach of an alleged contract whereby the defendants agreed to withdraw from the active solicitation of business in a foreign country in favor of the plaintiff, their former agent, who had been acting for them there. Evidence examined, and held, that the question as to whether the alleged contract was made should have been submitted to the jury with instruction that if they found the agreement they should find at least nominal damages, the breach being conceded.

A judgment will not be reversed merely to enable the plaintiff to recover nominal damages if the judgment does not estop him as to other interests.

But where it is apparent that had the proper legal rules been applied substantial damages for breach of contract could have been recovered on proper proof, a judgment will be reversed for a failure to award nominal damages so that the plaintiff may have an opportunity to prove substantial damage.

Where it is apparent that substantial damages have been caused by breach of contract defendants cannot escape liability merely because the damage cannot be ascertained exactly. In order to approximate the damage speculative elements may be considered and the jury may indulge in reasonable conjectures and probable estimates arising from the proof.

But the proof of substantial damage must be such as supports such reasonable conjectures and probable estimates and the damages must be such as were reasonably within the contemplation of the parties directly traceable to the breach and not the result of intervening causes.

The damages for such breach may include losses suffered and probable profits prevented.

The measure of damages is the value of the contract at the time of the breach, to be determined upon relevant antecedent and subsequent facts, not, however, on opinion evidence.

While damages must be certain not only in their nature but as respects the cause from which they proceed, they need not be shown with mathematical certainty, but only with such reasonable certainty as serves as a basis for the ordinary conduct of human affairs.

In order to show damages for the breach of the contract aforesaid plaintiff should have been allowed to prove the general nature of the business from which the defendants agreed to withdraw, how it was conducted by them, that after the breach he acted for another company which dealt in the same commodities, to what extent he was able to procure business from the defendants' former customers and to what extent he could secure business after the breach by the defendants.

MOTION by the plaintiff, W. Tyrie Stevens, for a new trial upon a case containing exceptions ordered to be heard at the Appellate Division in the first instance upon the dismissal of the complaint at the close of plaintiff's case by direction of the court on a trial at the Kings County Trial Term in April, 1910.

Second Department, February, 1912.

[Vol. 149.]

Louis Marshall [Abraham Benedict with him on the brief], for the plaintiff.

Courtland V. Anable [De Lancey Nicoll, Cornelius J. Sullivan and Raymond D. Thurber with him on the brief], for the defendants.

CARR, J.:

On the second trial of this action the court dismissed the complaint of the plaintiff and directed that his exceptions be heard in the first instance by this court, entry of judgment in the meanwhile being suspended. The case is now before us on the exceptions of the plaintiff and the defendants' motion for judgment. The action is at law to recover damages for a breach of contract. It is our duty to consider the facts proved by the plaintiff in the aspect most favorable to him, as a nonsuit was directed.

It appears that prior to February, 1901, the plaintiff had been a member of a copartnership which carried on the business of selling general merchandise in South Africa. This copartnership was dissolved, and in February, 1901, a written contract was entered into between the plaintiff and the defendants as copartners whereby the plaintiff became the agent or representative of the defendants in the business of selling general merchandise in South Africa. This agreement obliged the plaintiff to turn over to the defendants "all patents, trade marks, agencies, and compensation of which he is the owner or of which he has control." It prescribed the duties of the plaintiff and provided for his compensation at \$300 per month in addition to proper expenses while in South Africa, "together with a sum equal to twenty-five per cent (25%) of the net annual profits of said department," i. e., the South African agency of which the plaintiff was to have charge. The contract was to run for three years and it contained a clause as follows: "It is Understood, that at the expiration of this contract this agreement shall be renewed upon such terms and for such length of time as shall be mutually satisfactory to the parties hereto."

The plaintiff entered into the performance of the duties required by the agreement, and the mutual arrangements

between the parties were carried out apparently without controversy during the three years specified. When the original agreement expired, in February, 1904, the plaintiff was in South Africa in charge of the business of the defendants. No formal arrangements were made for the renewal of the contract, but the business continued along as theretofore. On May 18, 1904, the plaintiff, with the consent of the defendants, left South Africa to return to New York on a visit. After reaching New York he called upon his principals and a discussion took place between them relative to an announced intention of the defendants to discontinue the South African department of their general business. It appeared that the defendants were of opinion that the net profits of this department were not commensurate with the volume of business done. The plaintiff attempted to dissuade the defendants from discontinuing their South African department. The discussion culminated on June 29, 1904, in an understanding between the plaintiff and the defendants which the plaintiff in his complaint in this action pleads as follows: "Sixth. Thereafter and on or about the 29th day of June, 1904, the defendants notified the plaintiff that they had decided to give up their said South African Department, and to withdraw from the South African trade, except so far as orders might come to them unsolicited from three or four of the firms with whom they had theretofore carried on business, and the defendants thereupon agreed with the plaintiff for a valuable consideration, that they would turn over to him the entire business and good will of the said South African Department (with the exceptions above mentioned), the office staffs connected with the said department, both in New York and in South Africa, and all brands and trade-marks connected with the said South African business which they owned or controlled, and all agencies which they had secured from various manufacturers and merchants to represent them in the South African trade, and to withdraw from and cease competition for the South African trade, except to the limited extent above mentioned. Thereupon, in consideration of the premises, the plaintiff agreed to waive all of his rights under his aforesaid contract with the defendants, and to accept therefor the aforesaid trans-

Second Department, February, 1912.

[Vol. 149.]

fer of the defendants' business and good will, and their promise to withdraw from and cease competition for the aforesaid South African trade."

In the complaint the plaintiff pleads also a breach of the agreement so alleged and asks damages therefor. While the various defendants answer separately, their pleadings are the same in form. Each answers the allegations of the plaintiff as to the agreement in form as follows: "VI. He admits that on or about the 29th day of June, 1904, the defendants notified the plaintiff that they had decided to give up their South African Department as theretofore and then conducted, and agreed to turn over to said plaintiff the office staffs connected with said department both in New York and in South Africa, and all brands and trade-marks connected with said South African business which they owned or controlled, and all agencies which they had secured from the various manufacturers and merchants to represent them in the South African trade, and that plaintiff agreed to waive all of his alleged rights under said contract with the defendants, as alleged in the paragraph of the complaint herein numbered Sixth, but he denies each and every other allegation in said paragraph of the complaint herein numbered Sixth."

Each defendant likewise denied a breach of the alleged agreement and the allegation of the complaint as to damages. When the plaintiff at the trial came to sustain the allegations of his complaint as to the alleged agreement he gave proofs which may be summarized as follows: On June 29, 1904, he met the defendants Amsinck and Pavenstedt; he asked them for their final decision as to the continuance or abandonment of the South African department; Amsinck, in the presence of Pavenstedt, said: "I have decided to close the South African Department; I don't like it; I don't want it. It has been a very large business, and I don't want my name on paper all over the world. I am getting an old man, and I want to leave my affairs in order. I will transfer the entire business to you, with the exception of three or four large accounts, such as Hunt, Leuchars & Hepburn; Baker, Baker & Co. and Vanderbyl & Co.; we will transfer to you all of the books, the staffs at New York and in South Africa, all brands, trade-marks and agencies

App. Div.] Second Department, February, 1912.

we are connected with in the South African business, and you can — we have nothing against you, Mr. Stevens. You can take your time about leaving. We will say this will be all right up to the 1st of September. You can come and go about your official duties here as you like.” Mr. Pavenstedt then spoke up and said: “Mr. Stevens, you understand that we are merchants, and while we are giving up the South African business and will not seek business any further in that field, you must clearly understand that if a merchant sends us an order from abroad, from any part of the world, accompanied by a letter of credit, we reserve the right to execute it.” Mr. Stevens said: “Gentlemen, my contract is good for at least another three years, but if you are willing to turn over to me a business worth \$50,000 a year, all I can say is, I will take it.” Mr. Pavenstedt then said: “Mr. Stevens, if there is any firm here that you would like us to interview on your behalf, with whom you think of becoming connected, just let us know, and we will be glad to do it, and you may refer to us freely in every respect.” Mr. Stevens answered: “I thank you, Mr. Pavenstedt. Will you be good enough to give me a letter to this effect, covering our agreement?” Pavenstedt replied: “With pleasure.” Thereupon the following letter was drawn up and delivered to Stevens:

“G. AMSINCK & Co.,
“6 to 9 Hanover Street,
“New York.
‘Tel. Address, Amsinck.

NEW YORK, 29th June, 1904.

“To whom it may concern:

“We hereby beg to state that Mr. W. T. Stevens has been in our employ for over three years, being part of the time at the head of our South African department, and mostly as our agent and representative in South Africa, residing at Capetown.

“We have much pleasure in stating that he proved to be an energetic and able man in this position. We now sever our connection with him as we give up our S. A. department for purely business reasons, and most heartily wish him good luck and success in his future career.

“G. AMSINCK & CO.”

Second Department, February, 1912.

[Vol. 149.]

Thereafter the plaintiff set about to connect himself with some firm or corporation engaged in the business of selling general merchandise in South Africa. In consequence of such efforts, the following correspondence passed between the parties to this action:

"NEW YORK, Aug. 2, '04.

"Messrs. G. AMSINCK & Co.,

"New York:

"DEAR SIRS.—In view of your decision to close the South African Department and to withdraw all active representation from that field, in consequence of which you asked me to discontinue my services from Sept. 1st next, I beg to state that I am offered a position with the American Trading Co. but do not wish to accept until I have your authority in writing and your confirmation of the above also of the following:

"That you will allow me to take over those members of the staff at New York and in South Africa that I require. That you will transfer to the American Trading Company so far as lies in your power, all Agencies from Mfrs. all trade-marks, brands, &c., now belonging to you and connected with South Africa.

"I should also be satisfied to have the account between us closed as it now stands each giving the other a clean receipt.

"Yours faithfully,

"W. TYRIE STEVENS."

"G. AMSINCK & Co.,

"P. O. Box 242,

"New York.

"Tel. Address, Amsinck.

NEW YORK, 2d Aug. '04.

"W. TYRIE STEVENS, Esq.

"Prst.:

"DEAR SIR.—In answer to your favor of even date, we beg to say that our firm has not yet decided, whether we shall continue to do any business in South Africa or not.

"We shall transfer to the American Trading Co., as far as lies in our power, all agencies from manufacturers, trade-marks, brands, &c., connected with our S. Afr. business to-day.

App. Div.]

Second Department, February, 1912.

" We hereby state that we consider the accounts between us closed and balanced, you waiving all claim on any interests in profits of the South African department for the present year, and we making no further claim upon you for any balance against you on our books. Please confirm this in writing to

" Your truly,

" G. AMSINCK & Co."

" NEW YORK, Aug. 3, '04.

" Messrs. G. AMSINCK & Co.,

" New York:

" DEAR SIRS.—I am in receipt of your favor of 2nd inst. and I hereby confirm your remarks, except in respect to the possibility of your doing some South African business in the future. Regarding this I will rely on the assurance of Mr. Amsinck that you do not intend to seek business in that field, reserving to yourselves the right to execute orders if offered. You may therefore regard my engagement as cancelled from Aug. 31st prox.

" Thanking you for all past courtesies of which there are many, I remain,

" Yours faithfully,

" W. TYRIE STEVENS."

On August 2, 1904, the plaintiff entered into a contract with a corporation known as the American Trading Company, whereby he became its representative in South Africa in the business of selling general merchandise at an annual salary together with an interest in the net profits. The defendants then sent to many of their customers written notices as follows:

" G. AMSINCK & Co.,

" P. O. Box 242,

" New York.

" Tel. Address, Amsinck.

" NEW YORK, Aug. 5/04.

" THE REEVES PULLEY Co.,

" Columbus, O.:

" DEAR SIRS.—The present serves to advise that we are about to give up our South African Department, and Mr. W. Tyrie Stevens, who has represented us for over three (3) years in that

Second Department, February, 1912.

[Vol. 149.]

territory, has made arrangements to carry on the business with the American Trading Co., of this City, and will represent them in the above mentioned territory.

"We would thank you to transfer your contract and agency allowed us, over to the American Trading Co., who will, doubtless, be able to handle the business to your entire satisfaction.

"Yours very truly,

"G. AMSINCK & CO."

The plaintiff claims that the facts above stated establish a contract between him and the defendants whereby they bound themselves to refrain from active solicitation of business in South Africa. If such be the case, then under the other proofs in this case there was a clear breach subsequently of such agreement, inasmuch as the defendants resumed their South African business as theretofore conducted and actively solicited trade in competition with the plaintiff and the American Trading Company, and as to this there is no controversy. It is the contention of the defendants that no binding contract was made between the parties on June 29, 1904, to the extent that the defendants should refrain thereafter from active solicitation of trade in South Africa. They urge that whatever was said at that time on that question was not contractual in nature, but was a mere statement of intention subject to change and from which no binding obligation resulted.

While it is true that a mere statement of intention may not be a sufficient basis for such an acceptance as will result immediately in a binding agreement, yet whether the terms of the statement and the attending circumstances are such as to give the other party the right to act upon it as an intended offer is a question to be submitted to the jury. (*Thurston v. Thornton*, 1 *Cush.* 89; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260.) And if the statement be in such form that it may be susceptible of more than one meaning, it is to be interpreted in the sense in which the promisor had reason to expect that it was understood by the promisee, and this is likewise a question for the jury. (*White v. Hoyt*, 73 N. Y. 505, 511.)

Whether, therefore, a binding contract was made between these parties that the defendants should withdraw from active

App. Div.] Second Department, February, 1912.

solicitation of business in South Africa, but at the same time reserving the right to accept all orders as might come to them without such solicitation of business, should have been submitted to the jury, and as, if there was such an agreement, there was concededly a breach, the jury should have been directed to find at least nominal damages if they found the agreement. A judgment will not be reversed on appeal simply because a plaintiff has not been allowed to recover nominal damages, where that judgment does not serve as an estoppel in respect to other interests; but where it is apparent that, on a proper application of legal rules, substantial damages may be recoverable on sufficient proofs, a judgment so entered should be reversed for the failure to award nominal damages, and simply in order that an opportunity may be given to recover such substantial damages as competent proofs may justify. (*Thomson-Houston El. Co. v. Durant Land Imp. Co.*, 144 N. Y. 34.)

Whether it is certain the plaintiff can succeed in proving some substantial damages is a most troublesome question. Such attempt may have its difficulties and the actual amount of such damages may not be free from some doubt. Yet, where there has been a breach of contract, and it appears certain that some substantial damages have resulted, a defendant cannot escape liability for such damages simply because they cannot be ascertained exactly, and that, in order to approximate them, some speculative elements must enter into consideration; for, under such circumstances, a jury may indulge in "reasonable conjectures and probable estimates" arising from the other proofs. (*Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205.) These other proofs, however, must be of such nature as to support such "reasonable conjectures and probable estimates," and the damages sought must be such as were reasonably within the contemplation of the parties, and directly traceable to the breach, and not the result of intervening causes. They may include losses made and probable profits prevented. The measure of the damages is the value of the contract at the time of its breach. (*Wakeman v. Wheeler & Wilson Mfg. Co., supra.*) This question of value is to be determined upon the relevant facts antecedent and subsequent to the breach,

Second Department, February, 1912.

[Vol. 149.]

and is not the subject of opinion evidence. Where the breach of contract is due to the act and fault of the defendant, by which probable profits are prevented, it has been said that "courts ought not to be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits." (*Dart v. Laimbeer*, 107 N. Y. 664, 669.)

However, to be recoverable at all, the damages "must be certain, not only in their nature, but as respects the cause from which they proceed." (*Witherbee v. Meyer*, 155 N. Y. 446.)

The rule as to certainty of damages and of their cause does not require a mathematical certainty but only such reasonable certainty as serves as a basis for the ordinary conduct of human affairs.

It appeared from the plaintiff's proof that, at the time the alleged agreement was made between the parties to this action, there were a number of other firms competing with the defendants in the business conducted by their "South African Department," five important firms and at least five others of lesser importance. It likewise appeared that, during the time from 1901 to and including 1904, the defendants had done a large volume of business in an annual amount of over \$1,000,000 in the "South African Department," and that said business was in some years profitable to an extent which it is not now necessary to discuss.

It appeared likewise that after the alleged breach the defendants did a South African business for several years, varying in volume from \$200,000 to \$300,000 a year. Proof was given of the general nature of the South African business, of the plaintiff's long experience in it and of his general ability to handle it. When the plaintiff was asked on his direct examination to "State the general nature and character of the business and how it was conducted for the defendants," the question was excluded on the defendants' objection. Neither was he allowed to testify that after the alleged breach he, for the American Trading Company, dealt in the same class of commodities as had been and were being dealt in by the defendants: "South African Department," nor to what extent he was able to procure business from the former customers of the "South African Department," nor to what extent he was able to secure

App. Div.] Second Department, February, 1912.

business at all after the alleged breach by the defendants. We think that the plaintiff should not have been prevented from giving evidence on these points. To be sure such evidence lacked definiteness, but it was the best that was obtainable under the circumstances. It would seem to come within the spirit of the rule declared in *Wakeman v. Wheeler & Wilson Mfg. Co.* (*supra*) and of many of the subsequent cases which have followed and applied that rule. In a somewhat similar case (*Nash v. Thousand Island Steamboat Co.*, 123 App. Div. 148), the court considered elaborately the rule applicable to cases of this character, and finding an exclusion of evidence material to the issues and which would have been available to establish substantial damages had it been allowed, declared as follows: "It is sufficient for the purpose of reversing this judgment to hold that there was *some* evidence that should have been submitted to the jury, and upon which the jury *might* have awarded substantial, as distinguished from nominal, damages." In view of the fact that not even nominal damages were awarded to this plaintiff, we infer that the learned trial court was of opinion that the plaintiff had not established satisfactorily the *factum* of the contract upon which he sued. This question, as we have above indicated, we think was a question for the jury under the proofs in this record.

We think that the exceptions of the plaintiff should be sustained and a new trial granted, costs to abide the event.

THOMAS, WOODWARD and RICH, JJ., concurred; JENKS, P. J., taking no part.

Exceptions of plaintiff sustained and new trial granted, costs to abide the event.

HELEN MARGARET FERGUSON, an Infant under the Age of Fourteen Years, by WILLIAM FERGUSON, Her Guardian ad Litem, Appellant, *v.* TOWN OF LEWISBORO, Respondent.

Second Department, February 23, 1912.

Highways — negligence — injury by defective approach to abutting property — liability of town — duties of town superintendent.

A town was not liable at common law for personal injuries caused by a defective highway. The present liability of a town is wholly the creation of the statute.

Section 73 of the Highway Law does not require the town superintendent to make repairs to a wooden driveway giving access from the highway to the lands of an abutting owner and to sue the owner for the expense thereof, where he was not directed to make the repairs by the town board.

Nor can the superintendent proceed against the abutting owner to compel him to repair such driveway unless there has been a prior direction for such repairs by the district or county superintendent.

A town is chargeable with the negligence of the town superintendent in failing to call the attention of the town board to an unsafe driveway of which he had knowledge, leading from a highway to abutting premises as section 47 of the Highway Law imposes upon the superintendent a duty of inspection.

But, *it seems*, no charge of negligence can arise against the superintendent if the town board fails to act after having been informed of the defect.

APPEAL by the plaintiff, Helen Margaret Ferguson, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 19th day of April, 1911, upon the dismissal of the complaint by direction of the court after a trial at the Westchester Trial Term, and also from an order entered in said clerk's office on the 12th day of June, 1911, denying the plaintiff's motion for a new trial made upon the minutes.

Raphael Link, for the appellant.

Henry R. Barrett, for the respondent.

CARR, J.:

The plaintiff appeals from a judgment of the Supreme Court in Westchester county dismissing her complaint, likewise from an order denying her motion for a new trial.

App. Div.] Second Department, February, 1912.

The action was brought to recover damages for a personal injury on the theory that the defendant had been guilty of negligence in failing to keep in a reasonably safe condition a part of a public highway. The proofs taken at the trial would have required the submission to the jury of the question of the defendant's negligence, were it not that the learned trial court was of opinion that the defendant town had no statutory duty as to the point on the highway where the accident in question took place. The plaintiff was an infant of two or three years of age, and was one of a party which occupied a carriage which was being driven upon the traveled portion of the highway from private property adjoining. The highway as constructed and maintained was bordered by a ditch which had been made for the drainage of the highway. The roadway was constructed originally by the State, and was macadamized in the part intended for general travel. At the point where this accident happened, the State contractors, in accordance with their contract, laid a wooden driveway across the ditch in order to provide access to the farm of one Silkman, which abutted the highway at that point. This driveway, or "bridge" as it is termed in the briefs on this appeal, spanned the bordering ditch, which was about two feet wide, and extended along the side of the road about twenty-four feet, its width being about six feet. The planking and timbers had been allowed to rot, and the horse, drawing the carriage in which the plaintiff was a passenger, stepped into or made a hole in the rotten planking, and fell, thereby causing grave personal injuries to the plaintiff. Some months before the accident, the town superintendent of highways had sent some men to the place in question to remove the planking temporarily for the purpose of cleaning out and restoring the original ditch which had been choked up with sand. These men were instructed to relay the planks as they found them. The planks were found by them at that time to be rotten, and the town superintendent was then so informed. He did not call this matter to the attention of the town board, and no repairs were made thereafter either by the town or the abutting owner. The rotten condition of these planks was the proximate cause of the accident in question. The plaintiff and her companions were lawfully on the

Second Department, February, 1912.[Vol. 149.]

highway and they had no connection with the abutting owner, whose premises they had visited for business purposes. At the time of the accident they were ordinary travelers on a public highway and the cause of the accident was a condition existing entirely within the highway lines, though not within the traveled or macadamized portion thereof.

By section 74 of the Highway Law (Consol. Laws, chap. 25; Laws of 1909, chap. 30) every town is "liable for all damages to person or property sustained by reason of any defect in its highways or bridges existing because of the neglect of any town superintendent of such town." It was urged, however, at the trial that as this wooden driveway was intended and used as an approach to and from the highway for the benefit of the abutting private property, no duty in relation thereto was cast upon the town superintendent by statute. This contention is based upon the provisions of section 71 of the Highway Law, which provides as follows: "The owners or occupants of lands shall construct and keep in repair all approaches or driveways from the highway, under the direction of the district or county superintendent, and it shall be unlawful for such owner or occupant of lands to fill up any ditch or place any material of any kind or character in any ditch so as to in any manner obstruct or interfere with the purposes for which it was made. The town superintendent may, when directed by the town board, construct and keep in repair such approaches and the expense thereof shall be a town charge." It appeared at the trial that the abutting owner had not been directed by the district or county superintendent to make any repairs to the approach or driveway in question. Likewise it appeared that the town superintendent had not been directed by the town board to make any repairs thereto. This action is brought against the town itself, and whether it be liable must be determined under the statutory provisions which impose liability, for at common law the town itself was not liable under such circumstances. In order that the town may be held liable for a "defect in its highways or bridges" such defect must be "existing because of the neglect of any town superintendent of such town." (Highway Law, § 74.) The defect here in question came about through lack of repair

App. Div.] Second Department, February, 1912.

of the approach or driveway. The town superintendent, however, had no duty to make repairs to this approach or driveway as a town charge unless so directed by the town board. Concededly, such direction was not given by the town board. Whether the abutting owner can be held liable is not before this court, as that person is not a party to this action. It is argued, however, that the town superintendent may be found guilty of neglect in failing to take steps to compel the abutting owner to put the driveway or approach in good condition of repair. Section 73 of the Highway Law provides as follows: "The town superintendent shall bring an action in the name of the town, against any person or corporation, to sustain the rights of the public, in and to any town highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered, or expenses incurred by such town, in consequence of any act or omission of any such person or corporation, in violation of any law or contract in relation to such highway." This section did not require him to make the repairs necessary and then to sue the abutting owner for the expense thereof, for he could not make these necessary repairs unless so directed by the town board. (Highway Law, § 71.) Nor could he proceed against the abutting owner to compel him directly to make repairs unless there had been a prior direction of the district or county superintendent requiring such repairs, and as it appears in this case no direction had been given by a district or county superintendent in relation thereto. The same statute which affixes liability on the town for a defect in the highway arising from the negligence of the town superintendent likewise renders the town superintendent liable over to the town for such damages as it may have paid or become liable for by reason of such negligence. (Highway Law, § 75.) Both sections of the statute should be construed together.

There is, however, another aspect of this case in which personal negligence on the part of the town superintendent may, as it seems to us, be chargeable properly. Section 47 of the Highway Law imposes upon the town superintendent a general duty of care and superintendence of the highways and bridges

Second Department, February, 1912.

[Vol. 149.]

in the town. This general duty of care and superintendence requires a reasonable inspection of the highway from time to time. When the highway from any reason becomes unsafe, to his knowledge as in this case, and if the circumstances be such that the action of the town board be required to remedy the defect, then, as we believe, he owes a positive duty to call the matter to the attention of the town board, so that the defect may be remedied. While no charge of negligence can arise against him if the town board neglects to act after he has informed it of the situation, yet a failure on his part to place the matter before the town board, when he has full knowledge, indicates a negligent performance of his general duty of care and superintendence, and the continuing defect may be said to be one "existing because of the neglect" of the town superintendent within the meaning of the statute as above cited.

We think that the judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., THOMAS, WOODWARD and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

JOHN C. HINRICHES, Respondent, *v.* THOMAS W. BUTTS,
Appellant.

Second Department, February 23, 1912.

Libel and slander — words charging incompetency in business, when libelous *per se* — privileged communication — pleading.

It is libelous *per se* to publish a letter calling the local manager of a mail chute company a "venomous incompetent creature * * * who either does not know how to put it (the chute) in order or wilfully queers it so that it will not serve the purpose for which it is wanted," and stating further that he should not be given another chance to "bedevil us and the job."

Willful words which hold a person up to hatred, ridicule, contempt or obloquy are libelous *per se*.

Words written of one in relation to his business or occupation which have a tendency to hurt or prejudice him therein are actionable although they charge no fraud or dishonesty and were written without actual malice.

App. Div.] Second Department, February, 1912.

One engaged in a mercantile business has as much right to recover for such libel as if he belonged to a learned profession.

Plaintiff suing for libel need not allege that the article was not privileged, the defense of privilege resting upon the defendant.

APPEAL by the defendant, Thomas W. Butts, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 15th day of December, 1911, denying the defendant's motion for judgment on the pleadings.

P. J. Dobson [Walter P. Vining with him on the brief], for the appellant.

Louis Ehrenberg, for the respondent.

WOODWARD, J.:

The defendant moved at Special Term for judgment dismissing the plaintiff's complaint, contending that although the plaintiff seeks to recover for an alleged libel, the complaint fails to state a cause of action.

It appears that the plaintiff was in the employ of the United States Mail Chute Equipment Company, and the manager of its New York office. The alleged libelous words are contained in a letter written by the defendant to the equipment company. In that letter the defendant refers to the plaintiff as "*the venomous incompetent creature who has charge of your office here and who either does not know how to put it in order* [meaning a certain mail chute] *or wilfully queers it so that it will not serve the purpose for which it is wanted,*" and further saying in substance that the equipment company was giving "your New York Manager another chance to *bedevil us and the job.*"

It is urged by the defendant that the words are not libelous *per se*; that there is no sufficient allegation of any trade, profession or occupation, and that, in the absence of an allegation of any specific damage, the plaintiff is not entitled to recover, and, therefore, the defendant was entitled to a dismissal of the complaint.

If we analyze the words used we are of the opinion that they touch the plaintiff in his private character, in that they charge him with being "*venomous,*" with an intention to "*wilfully queer*" his work, and "*bedevil*" the job. To characterize a

Second Department, February, 1912.[Vol. 149.]

person as possessing those qualities charges such moral delinquency as necessarily affects him in his personal character, and in our opinion is libelous *per se*. To charge him with being "*incompetent*" tends to injure him in relation to his business and occupation. In the case under consideration the letter in question tends to injure the plaintiff in his private character as well as his standing in his business and occupation.

It goes without saying that willful words which hold a person up to hatred, ridicule, contempt or obliquy, are libelous *per se*. The words of the letter do nothing less.

So, too, words written of a man in relation to his business or occupation which have a tendency to hurt, or are calculated to prejudice him therein, are actionable, although they charge no fraud or dishonesty, and were without actual malice, and, when proved, unless the defendant shows a lawful excuse, the plaintiff is entitled to recover. (*Moore v. Francis*, 121 N. Y. 199; *Krug v. Pitass*, 162 id. 154, 159; *Bornmann v. Star Co.*, 174 id. 212, 219; *Triggs v. Sun Printing & Pub. Assn.*, 179 id. 144, 153; *Le Massena v. Storm*, 62 App. Div. 150, 153; *Gibson v. Sun Printing & Pub. Assn.*, 71 id. 566, 569; *Cruikshank v. Gordon*, 118 N. Y. 178, 183.) We think these authorities dispose of the defendant's contention, and the court was correct in denying the defendant's motion for judgment.

In our judgment it would be absurd to hold, as contended by appellant, that because the plaintiff did not practice a profession or follow a trade, he was not equally protected from unjust attack. He was apparently the local manager of a large and important business enterprise. His good name and reputation as the business manager of such a concern is just as sacred as though he were prominent in one of the learned professions. The law should be just as zealous to protect the reputation of a business man as one of capacity and ability, as one engaged in following a trade or practicing a profession.

The appellant further contends that the letter containing the words complained of is a privileged communication. Assuming such to be the fact, such privilege rests with the defendant to establish as a defense, and it is not for the plaintiff in the first instance to show that the article is not of the privileged class. Communications otherwise privileged cease to be privileged

App. Div.] Second Department, February, 1912.

when actuated by malice and made in bad faith. The letter in question is so intemperate in language that a jury might well infer the writer was actuated by feelings of personal malice toward the plaintiff.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., HIRSCHBERG, BURR and RICH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

VICTOR KOECHL, Appellant, v. GATE DEVELOPMENT COMPANY and Others, Defendants.

J. ALFRED BERGER, JR., as Executor, etc., of ROBERT J. FREEMAN, Deceased, Respondent.

Second Department, February 28, 1912.

Foreclosure — sale — power of court to relieve purchaser from bid.

The court in its discretion may relieve a person who has bid in lands on a foreclosure sale from his purchase where it subsequently appears that a person not made a party to the suit claims to be the owner of the equity of redemption and has moved for an order to show cause why the sale should not be vacated and set aside. This is true although the affidavits do not show a positive defect in title, as the purchaser should not be burdened with a threatened law suit.

APPEAL by the plaintiff, Victor Koechl, from an order of the County Court of Kings county, entered in the office of the clerk of said county on the 6th day of October, 1911, granting the respondent's motion to be relieved of his purchase on a foreclosure sale.

Edwin Kempton and Charles Bradshaw, for the appellant.

William S. Woodhull [Beno B. Gattell with him on the brief], for the respondent.

WOODWARD, J.:

Emily F. and Hannibal French executed a mortgage to the Title Guarantee and Trust Company for \$4,000 on the 3d day of November, 1899, which became due in three years from its

Second Department, February, 1912.

[Vol. 149.]

date. The Title Guarantee and Trust Company assigned the bond and mortgage to the plaintiff in this action on or about November 16, 1899. Payment of the principal was subsequently extended to November 3, 1911, by an agreement made in 1908 by the Title Guarantee and Trust Company for the mortgagee, and one Annie Cohen, the then owner of the premises. Interest being unpaid, the plaintiff filed a *lis pendens* on December 3, 1910, and commenced a foreclosure action, which resulted in a judgment of foreclosure and sale on April 7, 1911. The premises were duly sold, J. Alfred Berger, Jr., as executor of Robert J. Freeman, becoming the purchaser for the purpose of protecting the estate, which was the owner of a second mortgage upon the premises for the sum of \$2,000. The executor paid \$523, ten per cent of the purchase price, together with \$17 for auctioneer's fees and other expenses. Intending to complete the purchase, Mr. Berger was informed by his attorney that he had been served with an order to show cause why the foreclosure sale should not be vacated and set aside and a resale ordered. This motion was made by an attorney representing the Greenwich Investing Company, claiming to be the owner of the equity of redemption in the premises purchased by Mr. Berger at the foreclosure sale. This motion resulted in an order denying the motion. Being thus advised of a claim on the part of the Greenwich Investing Company, which was not a party to the foreclosure action, Mr. Berger moved the County Court of Kings county to be relieved of his purchase, and from the order granting this motion the plaintiff appeals to this court.

While it is true that the affidavits submitted upon the motion do not conclusively show that there is any defect in the title, it is plain to be seen that there is an opportunity for a lawsuit, which appears to be threatened. There is no doubt that there was a conveyance of the premises by the Gate Development Company, one of the defendants in the foreclosure action, to the Greenwich Investing Company on the 30th day of September, 1910; that the deed was duly acknowledged on the 1st day of October, 1910, and recorded in the office of the register of the county of Kings on the 15th day of March, 1911, and it is claimed that the premises were in the

App. Div.] Second Department, February, 1912.

actual possession of the Greenwich Investing Company, through its agent, one Cohen, and it is claimed that the plaintiff had notice of such claim of title and possession on the part of the Greenwich Company at the time of commencing the action. It is true that the facts do not appear positively, but there is clearly enough of the claim of the Greenwich Company to make it fairly certain that the title to the premises will be brought into question in some kind of an action, and it would be a hardship to the purchaser, who was compelled to purchase to protect the lien on the second mortgage, to compel him to stand the expense and annoyance of a lawsuit.

We think the matter rests in the discretion of the court, and that, no abuse of the discretion being shown, it is the duty of this court to affirm the order, which does no more than to place the respondent in practically the same position that he occupied before the sale.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., HIRSCHBERG and RICH, JJ., concurred; BURR, J., not voting.

Order of the County Court of Kings county affirmed, with ten dollars costs and disbursements.

VITTORIO SARTORI, as Administrator, etc., of EDWARDO ALBINO SARTORI, Deceased, Appellant, v. LITCHFIELD CONSTRUCTION COMPANY and RICHMOND LIGHT AND RAILROAD COMPANY, Respondents.

Second Department, February 23, 1912.

Pleading — demurrer — action to recover for death by wrongful act — misjoinder of parties — complaint stating single cause of action.

A demurrer to a complaint against two defendants to recover for the death of the plaintiff's intestate, on the ground that causes of action have been improperly united, is not well taken even though the plaintiff has attempted to state separate causes of action against the respective defendants, if in fact but a single cause of action is pleaded against them as joint tort feasors.

APP. DIV.—VOL. CXLIX. 16

Second Department, February, 1912.[Vol. 149.]

APPEAL by the plaintiff, Vittorio Sartori, as administrator, etc., from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Richmond on the 10th day of August, 1911.

Michael Schneiderman [Gino C. Speranza with him on the brief], for the appellant.

Martin A. Schenck, for the respondents.

CARR, J.:

The plaintiff appeals from an order of the Special Term denying his motion for judgment on the pleadings, under section 547 of the Code of Civil Procedure. The action was brought to recover damages for the death of the plaintiff's intestate through the alleged negligence of the defendants, the Litchfield Construction Company and the Richmond Light and Railroad Company. The facts alleged in the complaint show that the decedent was an employee of the defendant Litchfield Construction Company, and met his death through a charge of electric current which came from the wires of the defendant Richmond Light and Railroad Company into a derrick operated by the defendant Litchfield Construction Company, and about which the decedent was at work. The complaint was framed very inartistically. It attempted to set forth three causes of action, each numbered separately, two of which were set up against the defendant the Litchfield Construction Company, and one of which was set up against the defendant the Richmond Light and Railroad Company. The defendant the Richmond Light and Railroad Company demurred to the complaint on the ground that it appeared on the face thereof "that causes of action have been improperly united in that the causes of action set forth do not affect all the parties to the action."

The plaintiff moved for judgment on the pleadings, on the ground that the demurrer was insufficient. The learned Special Term denied his motion for judgment, and made an order sustaining the demurrer with taxable costs. While the plaintiff in form appears to have attempted to state separate causes of action against each of the respective defendants, yet the facts set forth in the complaint state only one cause of action, and

App. Div.] Second Department, February, 1912.

that against both defendants as joint tort feasors. (*Lynch v. Elektron Mfg. Co.*, 94 App. Div. 408.)

In determining the sufficiency of a pleading the court is not bound by the inartistic form adopted by the pleader, provided the substance of the allegations meets the general requirements of pleading. Under these circumstances, as there was actually but one cause of action pleaded, the demurrer to the complaint was not well taken, and the order sustaining said demurrer was erroneous. The order of the Special Term should be reversed, with ten dollars costs and disbursements, and the motion for judgment on the pleadings should be granted, with ten dollars' costs, with leave to the defendant demurrant to apply at Special Term for leave to withdraw the demurrer and to answer the complaint within twenty days.

JENKS, P. J., THOMAS and WOODWARD, JJ., concurred; BURR, J., not voting.

Order of the Special Term reversed, with ten dollars costs and disbursements, and motion for judgment on the pleadings granted, with ten dollars costs, with leave to defendant demurrant to apply at Special Term for leave to withdraw the demurrer and to answer the complaint within twenty days.

DOMENICO CASASSA, Respondent, *v.* FERDINANDO SAVARESE and RAPHAEL SAVARESE, Defendants, Impleaded with CARMELA SAVARESE, as Administratrix, etc., of VINCENZO SAVARESE, Deceased, Appellant.

Second Department, February 28, 1912.

Pleading — supplemental complaint — practice — death of one defendant after original complaint had been answered — reviving action — failure of representative to answer supplemental complaint — default — vacating judgment.

The purpose of a supplemental pleading is to set up facts occurring since the beginning of an action, or facts which had theretofore occurred but were unknown to the pleader.

Where, in an action against partners for goods sold and delivered, an order reviving the action against the administratrix of a defendant who

Second Department, February, 1912.

[Vol. 149.]

had died since the service of the defendants' answer did not provide that a supplemental complaint, permitted by section 760 of the Code of Civil Procedure, should take the place of the original complaint, it is error to enter judgment by default against the administratrix, who did not appear in the action, because of her failure to answer the supplemental complaint in so far as it repeated allegations of the original complaint.

APPEAL by the defendant, Carmela Savarese, as administratrix, etc., from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 8th day of September, 1911, denying the said defendant's motion to vacate and set aside a certain judgment.

Charles S. Mackenzie, for the appellant.

Joseph Nicchia, for the respondent.

CARR, J.:

This action was brought originally against Vincenzo Savarese, Ferdinando Savarese and Raphael Savarese, as copartners, doing business under the name of V. Savarese & Brothers, to recover the sum of \$538.56 on the allegation in the complaint that the plaintiff had sold and delivered to the defendants a certain quantity of California wine at an agreed price, which the defendants had neglected and refused to pay. The defendants answered, joining issue on the allegations of the complaint in October, 1899. Nothing further was done in the action until February, 1911, when the plaintiff, without notice to the defendants, who had appeared in the action, applied *ex parte* at Special Term in Kings county and obtained an order reviving the action against Carmela Savarese, as administratrix of Vincenzo Savarese, who had died in the meantime, which order contained a provision for the issuance of a supplemental summons and complaint. A supplemental summons and complaint was issued against the defendant Carmela Savarese, as administratrix, and this pleading set up again the contract of sale set forth in the original complaint. Carmela Savarese, as administratrix, neither answered the supplemental complaint nor appeared in the action. Thereupon judgment was taken against her on the ground that she was in default because of the failure to serve an answer to the supplemental complaint.

App. Div.] Second Department, February, 1912.

She has moved to set aside the judgment so entered as being irregular in that, as she claims, she was not obliged to put in issue the allegations of the supplemental complaint in regard to the sale of wines to her husband, such matter having been put in issue by the answer to the original complaint. Her motion to set aside this judgment as irregular was denied, and from the order so denying it she now appeals to this court. It is provided by section 760 of the Code of Civil Procedure that, where an action is revived as against the personal representatives of one of the parties to the original action, on the application of the plaintiff "the court may direct that a supplemental summons issue and that supplemental pleadings be made."

The subject of supplemental pleadings is regulated generally by section 544 of the Code of Civil Procedure, from which it appears that a supplemental pleading is one which alleges material facts which occurred after the former pleading, or of which the pleader was ignorant when the former pleading was made. It is likewise provided in this section that leave may be granted to make a supplemental pleading, either in addition to or in place of a former pleading. It was observed in *Horowitz v. Goodman* (112 App. Div. 13) that the meaning of the provision in section 544 of the Code that a supplemental pleading may take the place of a former pleading is not quite clear. It is the general rule, however, that the purpose of a supplemental pleading is to set up facts occurring since the beginning of the original action or facts which had theretofore occurred but which were unknown to the pleader. (*Horowitz v. Goodman, supra*; *Hayward v. Hood*, 44 Hun, 128; *Pierson v. Cronk*, 13 N. Y. St. Repr. 556; *Latimer v. McKinnon*, No. 1, 85 App. Div. 224.)

The order which revived the action and permitted the issuance of a supplemental summons and complaint herein did not provide, in express terms, that the supplemental complaint should take the place of the former pleading in the action. Under these circumstances, we think the issues made by the former pleading still continue. Such being the case, the defendant, Carmela Savarese, as administratrix, was not in default because she failed to answer the supplemental complaint in so far as it repeated the allegations of the original complaint which had

Second Department, February, 1912.

[Vol. 149.]

been already put in issue. After the service of the supplemental complaint the pleadings in the case consisted of the original complaint and the answer thereto and the supplemental complaint. As to the matters properly set forth in the supplemental complaint she was in default, but this default did not reach to and embrace the issues raised by the original pleading. It was error, therefore, to enter judgment against her merely because she failed to answer the supplemental complaint.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to vacate the judgment entered against her as irregular should be granted, with ten dollars costs.

JENKS, P. J., BURR, THOMAS and WOODWARD, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion to vacate judgment granted, with ten dollars costs.

In the Matter of Supplementary Proceedings: MORRIS GORDON and ABRAHAM GORDON, Judgment Creditors, Respondents, *v.* HENRY B. FELDBERG, Judgment Debtor, Appellant.

Second Department, February 28, 1912.

Contempt — debtor and creditor — supplementary proceedings — recitals in order directing imprisonment for contempt.

An order adjudging a judgment debtor guilty of contempt of court because of certain answers given on his examination in supplementary proceedings and directing his imprisonment if he failed to pay the fine imposed is fatally defective unless it contains an adjudication as to the specific facts deemed to be a contempt of court. A recital in said order which is only a general description of the court's impression of the judgment debtor's whole examination is insufficient.

APPEAL by the judgment debtor, Henry B. Feldberg, from an order of a county judge of Kings county, entered in the office of the clerk of said county on the 28th day of November, 1911.

Louis B. Williams, for the appellant.

Louis J. Gold, for the respondents.

App. Div.]Second Department, February, 1912.

CARR, J.:

This is an appeal from an order of a county judge of Kings county, dated November 28, 1911, which adjudged the appellant guilty of contempt of court because of his answers to certain questions put to him on an examination in supplementary proceedings in which he was the judgment debtor. The amount remaining unpaid on the judgment was thirty-nine dollars and thirty-one cents, and this amount, together with the sum of thirty dollars costs in the proceeding, was imposed as a fine upon the judgment debtor. Provision was made in said order for the imprisonment of the judgment debtor for thirty days in the Kings county jail, in the event that he failed to pay the fine so imposed upon him. The motion to punish the judgment debtor for contempt was based upon the examination taken in the supplementary proceedings, and the particular complaint made against him was that in answering some questions that were put to him he disclaimed knowledge or recollection of the matters covered by these questions. The order contains a recital as follows: "It appearing to my satisfaction that the testimony given by the judgment debtor shows a willful and deliberate attempt to frustrate the purposes of the examination and to prevent the ascertainment of the truth, and it appearing that the judgment debtor Henry B. Feldberg was willfully evading the questions by a disclaimer of knowledge or recollection of matters concerning which it is incredible that he should have wholly forgotten of personal transactions and facts that must have been within his knowledge and it appearing to my satisfaction that such testimony was calculated to and did impair, impede, prejudice, delay and defeat the rights and remedies of the judgment creditors herein "

The order then proceeds to direct the granting of the motion and contains a formal adjudication as follows: "And the judgment debtor, Henry B. Feldberg, is hereby adjudged guilty of a contempt of this court, and is hereby fined the sum of \$69.31."

I think this order is fatally defective in that it does not contain any adjudication as to the specific facts which the county judge deemed to be a contempt of court. If the recital in the order which has been quoted above can be deemed to be an

Second Department, February, 1912.

[Vol. 149.]

adjudication, yet it is not an adjudication of the particular circumstances of the relator's offense, as it is but a general description of the court's impression of the whole examination of the judgment debtor. Under the rule laid down in *People ex rel. Barnes v. Court of Sessions* (147 N. Y. 290) and *People ex rel. Palmieri v. Marean* (86 App. Div. 278) the order from which the judgment debtor appeals seems fatally defective.

The determination should be annulled, with ten dollars costs and disbursements.

JENKS, P. J., BURR, THOMAS and WOODWARD, JJ., concurred.

Determination of the County Court of Kings county annulled, with ten dollars costs and disbursements.

ROSIE BORGROSSER, Appellant, *v.* EBERHARD F. RISCH and BERTHA RISCH, Respondents.

Second Department, February 28, 1912.

Pleading — bill of particulars — specific performance — form of order — staying further prosecution — abstract of title.

An order requiring the plaintiff in a suit for the specific performance of a contract for the exchange of real estate to furnish a bill of particulars is unauthorized in so far as it stays further prosecution until the particulars are furnished.

A direction in the order that plaintiff furnish in the bill of particulars an abstract of her title is not justified, as the same is a matter of public record.

APPEAL by the plaintiff, Rosie Borgrosser, from part of an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 6th day of November, 1911.

Nathan April [Harry Cook with him on the brief], for the appellant.

Leonard J. Reynolds, for the respondents.

WOODWARD, J.:

The plaintiff brings this action for the specific performance of a contract for the exchange of real property. The complaint

App. Div.] Second Department, February, 1912.

contains the usual averments as to the making and delivery of the contract, and that she was at the time set for closing the same, and has been at all times since, ready, willing and able to complete the transaction, and demands judgment decreeing the specific performance of the contract, the defendants having refused to close as provided by the contract. The answer of the defendants denies the breach of the contract, and sets up two affirmative defenses. The first of these alleges that the plaintiff was unable to convey a good title to the premises which she had contracted to sell, and the second that the defendants were induced to enter into the contract by reason of fraudulent representations to them made by agents of the plaintiff. After issue had thus been joined, the defendants moved for a bill of particulars, resulting in the order appealed from. The order of the court commands the plaintiff to furnish the form of the deed as well as a summary of its contents, which the plaintiff then tendered to the defendants, in alleged performance of the contract, and an abstract of the title of the plaintiff in the property which she purported to convey, dating from the time that a certain corporation known as the Appleby & Wood Company held title to the premises. The order further provides that if these matters cannot with due diligence be ascertained by the plaintiff, she should so state, and it is further provided that until such particulars be furnished, as directed, the plaintiff be stayed from further prosecution of her action.

The rule is so well established that it is improper to penalize parties in reference to bills of particulars that it goes without saying that this order, in so far as it stays the plaintiff's action, is unauthorized. (*Prym v. Peck & Mack Co.*, 136 App. Div. 566, 568, and authority there cited; *Lee v. Brown*, 142 id. 933.) We are likewise of the opinion that, in so far as the order directs the plaintiff to furnish in a bill of particulars her abstract of title from the Appleby & Wood Company, it is not justified. It is nowhere alleged in the complaint that the plaintiff claims title through this company, or even that there is any such company in existence. But assuming that there is such a company, and that the plaintiff's title comes through it, these are matters of public record, as accessible to the defendant.

Second Department, February, 1912.

[Vol. 149.]

ants as to the plaintiff, and it asks for matter of a purely evidential character and which the plaintiff ought not to be called upon to produce in advance of the trial. She has alleged that she has been at all times mentioned in the complaint ready, willing and able to give the title which her contract calls for, and the burden is, of course, upon her to establish this fact; not that she has title through any particular person or corporation, but that she has such a title as her contract mentions.

The appeal does not complain of the portion of the order which calls for the form of the deed tendered, but does question the order in the other respects mentioned, and, we are of opinion, correctly.

The order appealed from should be modified in accordance with this opinion, and as so modified affirmed, without costs to either party.

JENKS, P. J., HIRSCHBERG and RICH, JJ., concurred; BURR, J., not voting.

Order modified in accordance with opinion by WOODWARD, J., and as so modified affirmed, without costs.

FREDERICK WINCKLER and VICTORIA WINCKLER, as Executors, etc., of LOUIS WINCKLER, Deceased, Respondents, *v.* LOUIS WINCKLER, Individually and as Executor, etc., of LOUIS WINCKLER, Deceased, Appellant.

Second Department, February 28, 1912.

Reference — delivery of report within sixty days — retention by referee pending payment of fees.

Where a referee appointed to take and state accounts between partners delivers his report to the attorney for one of the parties within sixty days after the evidence was finally submitted to him, the opposing party cannot have the reference terminated under section 1019 of the Code of Civil Procedure, because the report was allowed to remain in the office of the referee after the expiration of the sixty days, while the attorney for the successful party was arranging with his client for the payment of the referee's fees.

The fact that the referee made a finding of fact after the report was delivered does not show that he had not in fact delivered it.

Where the referee and the attorney for the successful party both swear that the report was delivered in time, and the only evidence to the con-

App. Div.] Second Department, February, 1912.

trary is the affidavit of defendant's attorney as to his understanding of certain conversations with the referee subsequent to the delivery of the report, a motion to terminate the reference under section 1019 of the Code of Civil Procedure is properly denied.

APPEAL by the defendant, Louis Winckler, individually and as executor, etc., of Louis Winckler, deceased, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 16th day of December, 1911, denying the defendant's motion to terminate a reference under the provisions of section 1019 of the Code of Civil Procedure.

Robert B. Bach [William P. Banigan with him on the brief], for the appellant.

C. H. Payne [Louis F. Doyle with him on the brief], for the respondents.

WOODWARD, J.:

By an interlocutory judgment in the above-entitled action entered on the 25th day of February, 1909, one George S. Billings was duly appointed referee to take and state the account of all and singular the dealings and transactions of the copartnership by and between the defendant and his deceased copartner, Louis Winckler. The case was duly taken up and hearings were had, and on the 5th day of October, 1911, the evidence was finally submitted to the learned referee for determination. On the tenth day of November of the same year, the referee notified plaintiffs' attorney that the report was ready for delivery, and the same was delivered on the same day to the plaintiffs' counsel, the referee having offered to file the same in the proper office. It seems that plaintiffs' counsel, after accepting delivery of the report, requested the referee to permit the same to remain in his office while counsel was arranging with his clients for the payment of the fees of the referee and stenographer, which aggregated about \$1,400. This was agreed to, and the report was left in the office of the referee. On or about the fifth day of December the referee wrote to each of the attorneys in the case, calling attention to the fact that the report was still in his office, and asking what was to be done about it, evidently as a modest reminder that his fees were still unpaid, and on the following day defendant's

Second Department, February, 1912.[Vol. 149.]

attorney served notice of his election to terminate the reference under the provisions of section 1019 of the Code of Civil Procedure. This notice was returned to defendant's attorney, with a statement that it was returned because defendant had no right to terminate the reference, and the notice was not returned to plaintiffs' attorney, and the latter subsequently served a notice of a motion to confirm the referee's report and for judgment for the plaintiffs, which notice was retained by the defendant's counsel, and the latter proceeded to serve opposing affidavits in accordance with rule 37 of the General Rules of Practice.

Later, upon affidavits of defendant's counsel, this motion was made, it being urged that the referee had admitted to defendant's counsel that the report was not delivered at dates subsequent to the alleged delivery. Attention is also called to a finding of fact made by the learned referee five days after the delivery. This is explained by the statement that plaintiffs reserved the right to have a further request passed upon, but this is not material here. The fact that the referee may have thought he had a right to make a further finding, after the delivery of the report does not operate to show that the report was not in fact delivered as stated. Plaintiffs' counsel swears positively that the report was delivered to him unconditionally upon the 10th day of November, 1911, well within the limit of time fixed by the Code of Civil Procedure, and the learned referee in an affidavit declares that this statement is true. There is no dispute upon this point, except the affidavit of defendant's attorney as to his understanding of certain conversations with the referee subsequent to the delivery, and it is easy to understand, from the explanations given, just how the referee had the physical possession of the report, while it was in fact delivered to the plaintiffs' attorney, who had control of the same at all the times mentioned subsequent to the tenth day of November.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., HIRSCHBERG, BURR and RICH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

WOOD MANUFACTURING AND REALTY COMPANY OF LONG ISLAND,
Respondent, *v.* HENRY F. THOMPSON and Others, Appellants,
Impleaded with JAMES H. CARROLL and Others, Defendants.

Second Department, February 28, 1912.

Contract — sale — building contract — agreement to furnish materials — abandonment of work by contractor — cancellation of contract — completion by owner — materialman not limited in recovery to contract price.

Where plaintiff agreed to provide a contractor with the materials necessary for building a cottage for a fixed price, payment to be guaranteed by the owner, and the latter, upon the abandonment of the work by the contractor, canceled his contract with him and notified the plaintiff thereof, at the same time ordering material to be delivered for the completion of the cottage which he himself finished, the plaintiff is entitled to recover from the owner the value of the materials furnished after the cancellation of the building contract and is not limited to the amount named in the agreement with the contractor.

Inasmuch as the owner never attempted to hold the contractor to the performance of his contract, or to obtain damages from him and inasmuch as he undertook to do the work through his own employees and formally canceled the contract, giving plaintiff notice thereof, he did not complete the work under the contract.

APPEAL by the defendants, Henry F. Thompson and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Nassau on the 16th day of December, 1910, upon the decision of the court rendered after a trial at the Nassau Special Term.

James L. Dowsey [Frederick C. Simons with him on the brief], for the appellants.

John P. Everett, for the respondent.

WOODWARD, J.:

On or about the 3d day of April, 1909, the defendant Henry F. Thompson entered into a contract with Thomas Bletcher, one of the defendants in this action, wherein Bletcher agreed to provide the materials and perform all of the work necessary in the construction of a cottage to be built at Manhasset, L. I., for the defendant Thompson. The agreed price was \$4,757.98.

The defendant Bletcher submitted an estimate of the materials necessary for the construction of the cottage to the plaintiff for the purpose of procuring a bid upon the price of such materials, and the plaintiff offered to provide the same at an agreed price of \$3,357, the payments to be guaranteed by the owner of the premises, the defendant Thompson. The guaranty was given and the plaintiff began the delivery of materials, Bletcher receiving them in behalf of the defendant Thompson, under his contract to construct the cottage. Subsequently, and while the defendant Thompson owed Bletcher between \$600 and \$700, the latter abandoned the work and the contract was canceled. Thompson then paid the plaintiff \$600 on account of the materials furnished to Bletcher, and notified the plaintiff of the cancellation of the contract, at the same time ordering goods to be delivered for the completion of the cottage. Thompson employed Bletcher by the day to complete the job. Later the plaintiff filed a notice of lien, and an action to foreclose the lien resulted in a judgment in favor of the plaintiff for the sum of \$1,479.74, from which the defendants Thompson appeal.

The theory of the appellants is that Thompson undertook to complete the work under the contract, and that he is liable only for the amount of money which was involved in the guaranty of the price of the materials to be used under the contract with Bletcher, but we are of the opinion that this position is not tenable. The evidence shows clearly that the contract between Thompson and Bletcher was canceled; that it ceased to have any binding force as between them, and that Thompson simply took the position of completing the construction of the cottage by purchasing his own materials and hiring Bletcher to do the work by the day. He was not completing the work under the contract with Bletcher; he never attempted to hold Bletcher to the performance of his contract, or to impose any burden of damages upon him. He consented to let Bletcher off, and undertook to do the work through his own employees, and the plaintiff, having notice of this change in conditions, consented to sell Thompson the materials, and the judgment of the court merely calls upon Thompson to pay for the goods which he purchased subsequent to the cancellation of the contract between Thompson and Bletcher.

App. Div.] Second Department, February, 1912.

When the rulings of the court are considered in connection with the obviously correct theory of the case, they are not open to objection, and we are of the opinion that the findings of fact are fully supported by the evidence, and the conclusions of law flow naturally from the facts thus found.

The judgment appealed from should be affirmed, with costs.

JENKS, P. J., THOMAS, CARR and RICH, JJ., concurred.

Judgment affirmed, with costs.

EMILY A. SMITH, Respondent, *v.* JAMES COCKCROFT and Others, Appellants, Impleaded with CHARLES NELSON and Others, Defendants.

EMILY A. SMITH, Respondent, *v.* HARRY F. BURNS and ELLA McK. BURNS, Appellants, Impleaded with LE GRAND SMITH and Others, Defendants.

Second Department, February 2, 1912.

Husband and wife — dower — death of husband — divorce — testimony of wife that she was never served with summons — evidence — section 829 of the Code of Civil Procedure — presumption.

A judgment of the Supreme Court is itself presumptive evidence of the court's jurisdiction.

Where in an action for dower it appears that plaintiff left her deceased husband over sixty years before the beginning of the action, and that at that time he obtained a judgment of absolute divorce against her in this State, and it further appears that from that time plaintiff was excluded from any participation in the care and custody of her children, that she supported herself without any demands on her husband, and that although desiring to see her children she did not attempt to force her husband to permit her to do so, the testimony of the plaintiff that she was never served with the summons in the divorce action should not be allowed to outweigh the affidavit of service, to the detriment of persons who had acquired her former husband's property relying upon the validity of the decree of divorce.

Evidence examined, and held, that the verdict for the plaintiff should be reversed as against the weight of evidence.

Testimony which the public policy of the State excludes as irrelevant and immaterial and to which objection is seasonably interposed is presumptively prejudicial to the party objecting; it is only where it is

Second Department, February, 1912.

[Vol. 149.]

obvious that the testimony could not have affected the result that the courts will overlook the error.

It is reversible error to allow plaintiff to testify that the reason she left her husband's home was because his father habitually assaulted her with a bellows and did other acts of cruelty and because her husband himself had cut her with a knife and otherwise ill used her. Such testimony is improper under section 829 of the Code of Civil Procedure.

APPEAL in the first action by the defendants, James Cockcroft and others, and in the second action by the defendants Harry F. Burns and another, from separate judgments of the Supreme Court in favor of the respective plaintiffs, entered in the office of the clerk of the county of Suffolk on the 15th day of April, 1911, upon the verdict of a jury, and also from separate orders entered in said clerk's office on the 7th day of March, 1911, denying respectively the defendants' motions for new trials made upon the minutes, and also, as stated in the notices of appeal, from the orders of the court directing the entry of the judgments appealed from.

Rowland Miles, for the appellants.

Frank F. Davis [*Raymond D. Thurber* with him on the brief], for the respondent.

WOODWARD, J.:

These two cases involve the same issues, except as to the title of a certain piece of real estate, and this, in the view which we take of the questions involved, is not important here. The action is brought by one Emily A. Smith, as the widow of Epenetus Smith, deceased, for the purpose of recovering her dower interest in the real estate of which the said Epenetus died seized, and which is now held by the several defendants claiming title through him. On the 11th day of November, 1851, Epenetus Smith, a widower, married Emily A. Pierson, the plaintiff in this action, and four children were born to them between that time and October, 1857. At that time the plaintiff left the home in Crab Meadow, town of Huntington, and has since resided in and about the city of New York, supporting herself, as she testifies, by doing sewing, housekeeping, and latterly by the practice of palmistry. She had two living

App. Div.] Second Department, February, 1912.

children at the time she left home, one of them a girl of five years of age and the other a boy of two, and she testifies that she came back to see these children at intervals until the girl had reached the age of fifteen years, since which time she has never visited the town of Huntington or made any inquiries after her family until the year 1910, when she appears to have sent for her son, who is still living, and to have returned with him to Huntington, where she resides with the son's daughter. For a period of forty-three years at least the plaintiff in this action appears to have lived within forty miles of the scene of her early married life without once visiting the place, and without making any inquiries, or giving any intimation of her whereabouts, and for a space of fifty-three years she appears to have made no claims upon her husband for support, nor does she appear to have insisted upon her rights as a mother to see her children, though she testifies to having returned to the place three or four times during the first year and several times subsequently, in the aggregate eight times, before she abandoned the effort to see them and retired from the scene. She testifies: "I went away from that place in 1857, it was somewhere in October. My son Le Grand did not go with me, neither did my daughter Rebecca. After I went away in the fall of 1857 I was back four times that one year. On those occasions I did not see my children Le Grand and Rebecca. The year following I came again, and the year after that I was there. I kept up my visits to this place where my children were until my girl was eight years old, before I ceased to go there. * * * I always used to carry them up something until twice, the last two times I was there I didn't take anything because they wouldn't let me leave them." The last part of this answer was subsequently struck out, but it is quoted as tending to show that the plaintiff, although concededly the mother of these children, was not permitted to see them or to leave presents for them, a most extraordinary thing if she was entitled to the rights of motherhood. Continuing, she says: "On the last occasion when I went to the house I saw my daughter Rebecca. I also saw Le Grand at that time, but he didn't come near me; he stood down by the wagon house."

Second Department, February, 1912.

[Vol. 149.]

She says that she had some conversation with her daughter Rebecca on this occasion, that it was most unpleasant. "After that I went away and stayed away; that was when she was fifteen years old; she was born in 1852. It was somewhere in the 60's. And from that time until last year I haven't been back in the neighborhood of Crab Meadow." On cross-examination she says: "After I left Crab Meadow in 1857, I returned the following spring, 1858, just when the trees were budding out; I remember it all. I didn't remain any length of time at all, I went right back, I couldn't see my children." The next time she came she testified that she "didn't remain any time, I went over to see them and left. I remained over night nowhere; sat in the woods until the boat got ready to go in the morning." On the occasion of the third visit she testifies that she stayed upon the boat that night; "the chambermaid said stay here, don't stay there if they treat you mean." It appears that this woman was not without motherly impulses; she came to see her children, bringing them presents, but she was not allowed to see them, or to leave presents; the only time she appears to have had any conversation with either of her children was when the daughter was fifteen years old, or ten years after the plaintiff had left Crab Meadow, and this interview was not a pleasant one. Certainly, if the plaintiff had not forfeited her rights as a mother there was no reason why she should not have been permitted to see them; no reason why she should not have insisted upon seeing them. She appears to have been on a friendly footing with Epenetus Smith's own brother, and several other people in that locality, and having the desire to see her children she could have found a way; she could have insisted upon a mother's right to, and the fact that she did not seems to us to have a very important bearing upon this case, and one which has been largely overlooked.

The defendants set up as a defense to these actions that "the said Epenetus Smith in his lifetime procured a judgment of absolute divorce within this State from his wife Emily A. Smith, upon the ground of adultery, and that the said Epenetus Smith never married again." The plaintiff replied to this defense, denying the allegation, and upon the trial the defendants

App. Div.]Second Department, February, 1912.

offered in evidence the judgment roll in an action for divorce in the Supreme Court between Epenetus Smith and Emily A. Smith, which judgment provided for the dissolution of the marriage, permitting the plaintiff Epenetus Smith to remarry, and forbidding the defendant Emily A. Smith to marry during the life of the said Epenetus Smith, and decreeing that "the plaintiff have the sole care and custody of Rebecca Smith and Le Grand Smith, the children of such marriage." Here, it would seem, is a very good explanation of the reason why this plaintiff was not permitted to see her children; the court had given Epenetus Smith, the father, "sole care and custody" of these children, because of the wrongful conduct of the plaintiff, and when she was denied access to them she was compelled to acquiesce. Having no right to the "care and custody" of her children, she went for a time in the hope of seeing them, and when finally she had a conversation with her daughter at fifteen years of age, which was not pleasant, she gave up the quest and went back to New York to live, remaining there for forty-three years with no effort to know more about any of them. In view of this condition, of this apparent acquiescence in what no virtuous mother would submit to without some show of resistance, what weight may be properly given to the plaintiff's unsupported statement that she was never served with process in this divorce action back in 1857? This was the one vital issue in the litigation, and the verdict of the jury, sustaining the plaintiff's cause of action as the widow of Epenetus Smith, rests entirely upon the testimony of the plaintiff, after a silence of more than half a century, during which time her status as a divorced woman has been established by a judgment of the Supreme Court, that she was never served with the summons in that action. The judgment of the Supreme Court, standing by itself, would be presumptive evidence of jurisdiction. (1 Freem. Judg. § 132.) In the case at bar this presumption is made to affirmatively appear by the affidavit of George F. Steinbrenner, "that on the seventeenth day of September last he served the annexed summons in the City of New York on the above-named Emily A. Smith, to him known to be the person mentioned and described in the summons as defendant therein; and that he

Second Department, February, 1912.

[Vol. 149.]

left with the defendant such copy as well as delivered it to her." This affidavit was sworn to on the 10th day of October, 1857, and was, upon its face, sufficient to give the court jurisdiction of the person of the plaintiff, and the judgment entered in that action is, in so far as it establishes the status of the plaintiff and defendant in that action, a judgment *in rem*, and is "binding on the whole world." (Freem. Judg. § 313, and authority cited in note; *Hood v. Hood*, 110 Mass. 463, 465, and authorities there cited.) This judgment, supported by the presumption of jurisdiction, and by the affirmative evidence of service upon the plaintiff, "operative and conclusive as to all the world" (*Hood v. Hood, supra*), has stood without question for more than half a century, during which time the plaintiff, in harmony with the terms of the judgment, has been excluded from any participation in the care and custody of her children; during which time she has supported and cared for herself, without any demands upon her former husband, and during which time the defendants, with the right to rely upon this judgment, have been acquiring the property involved in this action, is now set aside upon the verdict of a jury, based upon the simple, unsupported statement of the plaintiff that she was not served with the summons in the action. The man who made the affidavit of service is dead; at least he could not be produced upon the trial, and the verdict of the jury in this case in effect convicts him of the crime of perjury upon the testimony of one who is vitally interested in the result of this action, and who is not supported by a single fact or circumstance to give force to her testimony. In support of the presumption of jurisdiction, and the stronger presumption that George F. Steinbrenner, knowing the purpose of the action and that it was to come before the Supreme Court for adjudication, where the truth was likely to come out at any moment, did not deliberately commit perjury, is the conduct of the plaintiff during all these years, when everybody within the State of New York at least was bound to be governed by the adjudication in dealing with her or with her husband. Every fact and circumstance to which she testifies is what might be expected if the judgment had been known to her. She does not appear ever to have

App. Div.] Second Department, February, 1912.

claimed any right to see her children; from all that appears she came to the place, approached the home across lots, and, on being refused access to the children, went away without making any protest or asserting any of the rights of motherhood, just as it was her duty to do under the decree of the court. No suggestion was made that the plaintiff had any claim upon the children or upon her former husband; he was not asked to do anything toward her support and maintenance, nor in any manner to perform any of the obligations of a husband. It seems inconceivable that this judgment could have been in existence all of the years that the plaintiff was looking for an opportunity to see her children, and during which time it was binding upon every other person in the State of New York, in so far as it established her status, without its having come to her attention, and yet she testifies that she never heard of it until after this action was commenced, and the jury seem to have believed this statement, and to have in effect vacated the judgment in the divorce proceeding, to the injury of the defendants in this action, who must, in view of the judgment, be presumed to have acted in good faith in procuring their several interests in the property of Epenetus Smith. We cannot help thinking that the plaintiff has failed to produce that fair preponderance of evidence which entitles her to the verdict of the jury and the judgment which has been entered thereon.

Sufficient justification might be found for reversal in the error of the court in permitting the plaintiff, on recall, over the objection and exception of the defendants on the ground that it was incompetent, immaterial and irrelevant, and that it was not proper under the provisions of section 829 of the Code of Civil Procedure, to testify as to her alleged reasons for leaving the home of Epenetus Smith in 1857. The witness testified to the effect that Epenetus Smith's father, in the presence of her husband, habitually assaulted her with a bellows upon the head and body, and did other acts of cruelty, and that Epenetus Smith had himself cut her with a knife upon two occasions, and had otherwise ill used her. This testimony was improper under the provisions of section 829 of the Code of Civil Procedure, no one having opened the door as to any transactions between the plaintiff in this action and Epenetus Smith. But testimony

which the public policy of the State excludes, as well as all irrelevant and immaterial testimony, to which objection is reasonably interposed, is presumptively prejudicial to the party objecting, and it is only where it is obvious that the testimony could not have affected the result, that courts are justified in overlooking the error. Here, as we have already pointed out, the verdict of the jury rests upon a very small basis, not enough to fairly support the verdict, and it cannot be doubted that the recital of the alleged wrongs of the plaintiff when she was a mere child would have a tendency to appeal to the sympathies of a jury, and to produce a result which, however unjust to the defendants, would serve to compensate her for her sufferings. We think the error was not harmless; that it was fatal to a fair trial of the issues in this case.

The judgments and orders appealed from should be reversed and a new trial granted, costs to abide the event.

HIRSCHBERG, BURR, THOMAS and RICH, JJ., concurred.

In each case judgment and order reversed and new trial granted, costs to abide the event.

MICHAEL CROTTY, Appellant, v. THE ERIE RAILROAD COMPANY,
Respondent.

Second Department, February 23, 1912.

Pleading — demurrer — master and servant — contract of employment construed — right of employee to hearing before discharge — pleading — complaint showing breach of contract of employment — conditions precedent to recovery — performance rendered impossible by act of defendant — practice — leave to plead over.

In considering the sufficiency of a complaint the court may consider, not only express allegations, but facts implied therefrom by reasonable and fair intendment.

Where a contract of employment is not for a specified term it may be terminated at will by either party.

Where a contract of employment provided in substance that the employee should not be discharged without a hearing and full investigation with an opportunity to present witnesses in his behalf, and, if found blameless after suspension, should receive full pay for time lost, it should be

App. Div.] Second Department, February, 1912.

construed to mean that the employment should continue until dereliction of duty upon the part of the employee was established after a hearing.

Hence, a breach of such contract of employment is shown by an allegation that the plaintiff was discharged without a hearing or full investigation and opportunity to present witnesses in his behalf.

The employee in an action for a breach of such contract need not allege that he was found blameless in order to recover for time lost.

It seems, that the agreement to pay for time lost contained in such contract must be limited to time lost during suspension, and not to time lost through discharge, for the hearing must precede the discharge.

In any event the plaintiff was not required to allege that he had been found blameless as a condition precedent to recovery where the defendant by refusing a hearing made the performance of the condition impossible.

The plaintiff in such action sufficiently shows performance of conditions upon his part by alleging that he entered the defendant's employ pursuant to the agreement and continued his employment to a certain date. He is not required to negative any claim of dereliction of duty.

Moreover, a failure to perform his duties is excused where the defendant would not permit him to do so.

A defendant, having demurred to a complaint upon the ground that it fails to state facts constituting a cause of action, cannot withdraw the demurrer and answer as a matter of right. He will be required to apply to Special Term for leave to answer, and, *it seems*, must show a defense upon the merits.

APPEAL by the plaintiff, Michael Crotty, from an order of the Supreme Court, made at the Orange Special Term and entered in the office of the clerk of the county of Orange on the 27th day of December, 1911, denying the plaintiff's motion for judgment on the pleadings.

John C. Robinson, for the appellant.

John Bright, for the respondent.

BURR, J.:

Defendant demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action. Plaintiff moved for judgment on the pleadings, and from an order denying such motion appeals.

The question presented is as to the sufficiency of the complaint construing its allegations liberally with a view to substantial justice between the parties, and considering not only the express allegations therein, but such facts as may be

Second Department, February, 1912.

[Vol. 149.]

implied therefrom by reasonable and fair intendment. (Code Civ. Proc. § 519; *Marie v. Garrison*, 83 N. Y. 14.) The action is for damages for breach of a contract of employment. The complaint alleges that prior to March 17, 1909, plaintiff and defendant entered into an agreement by which defendant hired and employed plaintiff, and plaintiff agreed to work for defendant as a yardman in the capacity of yard conductor at defendant's railroad yards at an agreed compensation of three dollars per day. It further alleges that in pursuance of said agreement plaintiff entered the employ of defendant and continued in its employ to March 17, 1909, on which day he was discharged. If the contract of employment contained no terms or provisions other than those above specified defendant must succeed, for, where such contract is not for a specified term, it may be terminated at the will of either of the contracting parties. (Wood Mast. & Serv. [2d ed.] 159; *Martin v. Insurance Co.*, 148 N. Y. 117; *Williamson v. Taylor*, 48 Eng. C. L. [5 Q. B.] 175.) But the complaint contains this further allegation: "That in and by the terms of said employment it was provided that plaintiff as such yardman would not be suspended (except suspension pending investigation), discharged or have record entered against him without a hearing and full investigation, which would be given promptly; that he might have present during such investigation any actual witnesses of the occurrence under investigation, except discharged employees, and when found blameless, would receive full pay for the time lost." In effect, therefore, the contract provided that the term of plaintiff's hiring should continue until he had been given a hearing and full investigation, with the right to call "witnesses of the occurrence under investigation." While the subject of the hearing and investigation is not expressly stated, it must relate to some "occurrence." As the only "occurrence" which could properly be the subject of an investigation respecting his continuance in service must be some alleged dereliction in duty, we think that the contract fairly implies that it shall continue until such dereliction is established. This view is confirmed by the provisions of the contract to the effect that if found "blameless" after suspension he shall receive full pay for the time lost. He can be

App. Div.] Second Department, February, 1912.

found culpable or blameless only with reference to his own conduct. The complaint alleges that plaintiff was not given a hearing or full investigation, and that he was not afforded the opportunity to present any witnesses in his behalf. The contract was not, therefore, legally terminated by defendant. It is true that the decision of the master after such hearing as to the sufficiency of the charge may be final and conclusive in the absence of such bad faith as would constitute fraud, but, when the parties have thus agreed, the servant has a right to insist upon a full investigation, relying upon the fairness and justice of the master.

Respondent contends that in order to recover for time lost plaintiff should have alleged that he was found "blameless." It will be observed that the clause requiring a hearing applies alike to suspension and discharge. It would seem that the agreement to pay for time lost must be limited to that clause of the contract relating to suspension and not to discharge. The hearing must precede the discharge, since there is no provision therefor after the contract has been terminated. It may follow the suspension. But if the provision that plaintiff should be found "blameless" before claiming compensation could by any possibility be applied to both discharge and suspension and was a condition precedent to his recovery, defendant has made the performance of this condition impossible by refusing plaintiff a hearing. Respondent also contends that it was necessary for plaintiff to plead performance on his part of all the conditions of the contract to be kept and performed by him. He does allege that "in pursuance of said agreement" he entered the employ of defendant and continued in its employ up to March 17, 1909. The words "in pursuance of said agreement" apply to both. If he entered "in pursuance of said agreement" and continued "in pursuance of said agreement" to act as yardman, he did all that the contract required him to do. He was not required to negative any claim of dereliction of duty. A complaint equally general has been held sufficient. (*Williams v. Conners*, 53 App. Div. 599.) After March 17, 1909, he could not perform all the conditions of his contract, because defendant would not permit him to do so. This is not an action for wages earned under a contract, but for damages for the breach

Second Department, February, 1912.

[Vol. 149.]

thereof. These causes of action are distinct and independent. (*Perry v. Dickerson*, 85 N. Y. 345; *Allen v. Glen Creamery Co.*, 101 App. Div. 306; *Carlson v. Albert*, 117 id. 836.) The order cannot be sustained.

Respondent asks that, if the order be reversed, permission be given to it to withdraw its demurrer and answer. We think that respondent should be remitted to the Special Term for such relief as it desires. Having demurred, it could not withdraw the demurrer and answer as matter of right. (*Cashman v. Reynolds*, 123 N. Y. 138; *Smith v. Laird*, 44 Hun, 530; *Wise v. Gessner*, 47 id. 306; *Kaughran v. Kaughran*, 73 App. Div. 150.) If it desires as matter of favor to withdraw its demurrer and answer, it would seem reasonable that it should satisfy the court that it has a defense upon the merits. There is nothing before us upon which we can so determine.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

JENKS, P. J., THOMAS, CARR and WOODWARD, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

FIDALMA DEL GENOVESE, as Administratrix, etc., of VIRGILIO DEL GENOVESE, Deceased, Respondent, v. ALFREDO DEL GENOVESE, Appellant.

Second Department, February 28, 1912.

Discovery — examination of defendant after issue joined — equitable suit for accounting — scope of examination.

To sustain an order for the examination of an adverse party after issue joined it must affirmatively appear that the examination is material and necessary to the applicant in the prosecution or defense of the action. Where in a suit in equity for an accounting the allegations of the complaint upon which the right to the accounting is predicated are denied this issue must first be determined and an interlocutory judgment entered. If such judgment be for the plaintiff, then, and not until then, may the accounting be had.

App. Div.]Second Department, February, 1912.

Hence, where in such a case no interlocutory decree sustaining the plaintiff's right to an accounting has been entered, an order for the examination of the defendant before trial should limit the examination to those matters upon which the plaintiff's right to an accounting is predicated.

APPEAL by the defendant, Alfredo Del Genovese, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 22d day of November, 1911, denying the defendant's motion to vacate an order for his examination before trial.

William K. Hartpence [L. Laflin Kellogg with him on the brief], for the appellant.

Walter Carroll Low, for the respondent.

BURR, J.:

For a first cause of action plaintiff alleges that Virgilio Del Genovese and defendant entered into an agreement in October, 1890, by the terms of which defendant was to become the manager of a certain lodging house known as 268 Bowery, in the borough of Manhattan, a leasehold interest in which, together with the furniture and lodging-house equipment, belonged to the said Virgilio Del Genovese. For his services defendant was to receive one-half of the net profits of the enterprise during the continuance of the lease or any renewals thereof, and all materials and furnishings bought for use therein were to be the property of the said Virgilio. It is alleged that the agreement was in writing, and that a paper annexed to the complaint is a copy thereof. It is further alleged that defendant became manager, and continued to manage said property so long as Virgilio was the lessee thereof, namely, from 1890 to 1902, when defendant took a lease of the same in his own name, but in reality as agent and in trust for said Virgilio. It is further alleged that net profits resulted from the enterprise, the amount of which is unknown, and that after retaining one-half thereof a large sum still remained due and owing from defendant to said Virgilio. It is alleged that the said Virgilio died January 27, 1907; that on November 9, 1908, plaintiff was appointed administrator of his estate; that a demand was made upon defendant for an accounting, and that such demand was refused. For a second cause of action it is

Second Department, February, 1912.

[Vol. 149.]

alleged that in December, 1893, said Virgilio transferred to defendant all his real estate, under an agreement by which defendant was to manage the same, with a like provision as to division of profits, and upon an agreement to retransfer to said Virgilio upon request. It is further alleged that a considerable amount of property was thereafter transferred to defendant under the terms of said agreement, some of which is specifically described, and the exact location of other property so transferred is stated to be unknown. It is alleged that defendant violated his agreement and refused to account. The prayer for relief is for an accounting with respect to each transaction.

For answer to the first cause of action defendant admits making an agreement with Virgilio respecting the said leasehold property, but denies that the agreement is correctly set forth in the complaint. For affirmative defenses payment is pleaded and also the Statute of Limitations. In answer to the second cause of action all the allegations therein contained are denied except the death of Virgilio and the demand by plaintiff, and affirmative defenses are pleaded, consisting of the Statute of Limitations, the Statute of Frauds, a defect of parties defendant and that plaintiff has not legal capacity to sue. The answer then sets up eleven counterclaims arising out of loans and advances made by defendant to said Virgilio, indebtedness arising on bonds and promissory notes made by him and the conversion of certain personal property. The reply puts in issue all the allegations of the counterclaim and pleads payment and the Statute of Limitations.

On the 3d of October, 1911, an order was obtained *ex parte* directing defendant to appear and be examined concerning the issues raised by the pleadings. Subsequently a motion was made to vacate and set aside said order or to modify the same. This motion was denied, and from the order thereupon entered this appeal is taken.

To sustain an order for the examination of an adverse party after issue joined in an action it must affirmatively appear that such examination is material and necessary for the person applying therefor in the prosecution or defense of such action. (Code Civ. Proc. § 872, subd. 4; General Rules of Practice, rule

App. Div.] Second Department, February, 1912.

82; *Oakes v. Star Co.*, 119 App. Div. 358.) In the form in which this action is brought it must be sustained, if at all, as an action in equity for an accounting. (*Louda v. Revillon*, 99 App. Div. 481.) When the allegations of a complaint upon which the right to such accounting depends are denied, this issue must first be determined and an interlocutory judgment entered. If in favor of the plaintiff, under such judgment the accounting may be had. Until so determined an accounting is unnecessary. (*Moore v. Reinhardt*, 132 App. Div. 707; *Bushby v. Berkeley*, 135 id. 443; *Gow v. Ward*, 144 id. 593.) Until the making of the alleged agreements is established and the terms thereof and the obligations of the parties thereunder are determined defendant is not obliged to account. The items and details of such account are not essential to enable the plaintiff to maintain these issues. So far as the matters set up by way of counterclaim are concerned, if an accounting is ordered it is fair to presume that these matters will be submitted for determination to the referee appointed to take such account. If a separate trial of these issues should be successfully demanded and an examination of defendant should then become necessary, further application may be made for that purpose.

The order should be modified so as to limit the examination of defendant so far as the first cause of action is concerned to the terms and conditions of the agreement with reference to the leasehold property referred to therein, to the fact of the renewals of the lease, if any were made, and the terms and conditions thereof. So far as the second cause of action is concerned, it should be limited to the fact of any agreement relative to any property referred to therein and, if any such agreement existed, to the terms and conditions thereof and the property transferred thereunder. As so modified, the order appealed from should be affirmed, without costs.

JENKS, P. J., HIRSCHBERG, WOODWARD and RICH, JJ., concurred.

Order modified in accordance with opinion, and as so modified affirmed, without costs. Order to be settled before Mr. Justice BURR.

SARAH C. POSNER, Respondent, *v.* MAX ROSENBERG and ARTHUR H. SPERO, Copartners, under the Firm Name of MAX ROSENBERG COMPANY, Appellants. (Appeal No. 1.)

Second Department, February 23, 1912.

Pleading — bill of particulars — request for defendant's "claim" — when order for particulars improper — precluding giving of evidence.

A demand for a bill of particulars of the defendant's "claim" includes both defenses and counterclaims alleged.

An order for a bill of particulars should not require the defendant to disclose to the plaintiff substantially all the evidence in his possession necessary to support his claim.

It is premature to include in an order for a bill of particulars an order precluding the party from giving evidence if he fails to furnish the particulars required.

Order for a bill of particulars examined and modified.

APPEAL by the defendants, Max Rosenberg and another, copartners, etc., from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 22d day of November, 1911, granting the plaintiff's motion for a bill of particulars.

Charles A. Brodek, for the appellants.

Thomas J. O'Neill, for the respondent.

BURR, J.:

Defendants by their answer set forth various violations of plaintiff's contract of employment both as a defense and as the basis of a counterclaim. Plaintiff demanded a bill of particulars of defendants' claim. The word "claim" is sufficiently broad to include both defenses and counterclaims. (*Kelsey v. Sargent*, 100 N. Y. 602.)

To comply with the order granted by the court at Special Term defendants would be obliged to disclose to plaintiff substantially all of the evidence in their possession necessary to

App. Div.] Second Department, February, 1912.

support their claim. This is in violation of well-established rules. (*Smith v. Anderson*, 126 App. Div. 24; *Smidt v. Bailey*, 132 id. 177; *Nickel v. Ayer*, 141 id. 576.)

The provisions of the order precluding the giving of evidence for failure to furnish all the required particulars or any part thereof is premature. (*Smith v. Bradstreet Co.*, 134 App. Div. 567; *Hein v. Honduras Syndicate*, 138 id. 786; *Cossman v. Ballin*, 141 id. 68.)

The order should be modified by striking out the provision precluding the giving of evidence and so as to require defendants within five days after service of a copy of the order to be entered herein and notice of the entry thereof to serve a verified bill of particulars in regard to the following matters only:

1. The names and (if known to defendants) the addresses or places of residence of those employees of defendants whom plaintiff caused to leave their employ and enter the employment of their competitors in business and the names and addresses of such competitors.

2. The names and addresses of defendants' competitors in business for whose use plaintiff purchased patterns, designs, models, dresses and costumes.

3. The names and addresses of defendants' competitors in business to whom plaintiff furnished styles, patterns of dresses and costumes used by defendants in their business or to whom she divulged and disclosed trade and manufacturing secrets and secret information and valuable knowledge and information used, owned and acquired by said defendants, and the character of such secrets, information and knowledge.

4. The names and (if known to defendants) the addresses or places of residences of those employees of defendants whom plaintiff sought to entice to leave their employ and enter the employment of their competitors in business, and the names and addresses of such competitors.

5. The names and addresses of those individuals, firms and corporations with whom, prior to September 19, 1911, plaintiff sought to make arrangements to carry on business on her own account.

6. What orders, directions and regulations of defendants plaintiff failed and refused to obey.

Second Department, February, 1912.

[Vol. 149.]

As thus modified, the order appealed from should be affirmed, without costs.

JENKS, P. J., HIRSCHBERG, WOODWARD and RICH, JJ., concurred.

Order modified in accordance with opinion, and as so modified affirmed, without costs.

SARAH C. POSNER, Respondent, *v.* MAX ROSENBERG and ARTHUR H. SPERO, Copartners, under the Firm Name of MAX ROSENBERG COMPANY, Appellants. (Appeal No. 2.)

Second Department, February 23, 1912.

Practice — frivolous demurrer — motion for judgment — contract — breach — liquidated damages — pleading — failure to allege non-payment — burden of proof.

While a motion for judgment is authorized where a demurrer is frivolous, *it seems* that the preferable practice is to move under section 547 of the Code of Civil Procedure authorizing judgment upon the pleadings after issue joined.

Where a copy of a contract is annexed to a complaint and referred to therein, the provisions are deemed to be incorporated in the pleading.

Where a contract employing the plaintiff as a designer and superintendent of a dressmaking establishment at a certain sum per week, with an additional percentage of the net profits of the employer, further provided that either party making a breach of the agreement should pay to the other the sum of \$10,000 as and for liquidated damages and not as a penalty, the liquidated damages may be recovered.

On a breach of a contract the general rule is that damages shall be allowed to extend to just compensation for the injury actually sustained. But even though the contract expressly provides in terms for liquidated damages, if it be clear from the sum mentioned and the subject-matter that the principle of compensation has been disregarded, the courts are not controlled by the words used.

Where from the nature of the contract the actual damages for breach are uncertain and by their nature difficult to ascertain with certainty, the parties may provide for liquidated damages.

In determining whether the sum mentioned in a contract is a penalty or liquidated damages, not only the words of the contract, the subject-matter and the sum mentioned may be considered, but also the surrounding circumstances.

App. Div.] Second Department, February, 1912.

As the contract aforesaid provided for liquidated damages, in an action at law the plaintiff's entire recovery for a breach is limited to the sum mentioned.

A complaint to recover liquidated damages on the breach of a contract fails to state a cause of action if it fails to allege non-payment.

When a complaint for the breach of a contract alleges non-payment the allegation is not put in issue by a general denial; the defense of non-payment must be affirmatively pleaded and the defendant is under the burden of proving the same.

APPEAL by the defendants, Max Rosenberg and another, copartners, etc., from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 23d day of December, 1911.

Charles A. Brodek, for the appellants.

Thomas J. O'Neill, for the respondent.

BURR, J.:

Defendants demurred to the second cause of action contained in plaintiff's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. From an order overruling said demurrer as frivolous, this appeal is taken.

Although for many years an application for judgment, if a demurrer is frivolous, has been authorized (Code Civ. Proc. § 537; Code Proc. § 247), it is difficult to see what useful purpose is served by such a motion since the amendment to the Code of Civil Procedure (Code Civ. Proc. § 547, as added by Laws of 1908, chap. 166), providing a summary method of testing the sufficiency of pleadings. (*Realty Associates v. Hoage*, 141 App. Div. 800; *Mitchell, Schiller & Barnes v. Follett Time R. Co.*, 142 id. 687.) In fact the moving party may be seriously prejudiced thereby, for the rule has become well settled that to succeed upon such a motion "the demurrer must be not merely without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection, and indicates that its interposition was in bad faith." (*Cook v. Warren*, 88 N. Y. 37; *Rankin v. Bush*, 93 App. Div. 181; *Shaw v. Fellman*, 99 id. 514.) In the case at bar it might be sufficient

Second Department, February, 1912.

[Vol. 149.]

to assign as a reason for reversing the order appealed from that the demurrer is not frivolous within the rule stated. But as the notice of motion contained a prayer for general relief, we have concluded to treat this as a motion under section 547 of the Code of Civil Procedure, and now dispose of the sufficiency of the complaint instead of postponing consideration thereof to a future time.

Plaintiff alleges the making of a contract between defendants and herself for her services as designer and superintendent of the dress and costume department of the business carried on by them for a period of three years, to begin with the 1st day of January, 1909, and to expire with the 31st day of December, 1911. A copy of the contract is annexed to the complaint and referred to therein. Its provisions are thereby to be deemed to be incorporated in said complaint. (*Jones v. Gould*, No. 2, 123 App. Div. 236; *Spence v. Woods*, 134 id. 182.) For her services plaintiff was to be paid the sum of \$100 per week, and in addition thereto a sum equal to thirty per cent of the net profits made by her employers in said department, which were to be ascertained semi-annually and credited to her account. The contract contained this further provision: "It is further understood and agreed, that in the event of a breach of this contract by either party hereto, the party so breaching will pay to the other the sum of Ten thousand (\$10,000) Dollars as and for their or her liquidated damages in the premises, and not as a penalty, but this provision of the agreement or the payment of such sum as liquidated damages shall not debar the non-breaching party from applying for and obtaining such equitable relief as they or she might be entitled to irrespective of such provision and such payment." Plaintiff alleges her wrongful discharge by defendants on September 19, 1911, and that her proportion of the net profits of the business amounted to about \$20,000, no part of which has been paid to her except the sum of \$9,133.25. For the balance remaining unpaid, judgment is demanded. The action is one at law and not in equity, and no facts are stated which could be the basis of equitable relief. That the sum named in the clause of the contract above quoted is not a penalty but for liquidated damages seems clear. The general rule is that damages shall be

App. Div.] Second Department, February, 1912.

allowed to the extent of just compensation for loss or injury actually sustained. Even although the language employed in a contract defines such damages as liquidated, if it is clear from the sum mentioned and the subject-matter thereof that the principle of compensation has been disregarded, courts will not be controlled simply by the words used. (*Jacquith v. Hudson*, 5 Mich. 123.) But "There are great numbers of cases where from the nature of the contract and the subject-matter of the stipulation for the breach of which the sum is provided it is apparent to the court that the actual damages for a breach are uncertain, in their nature difficult to be ascertained or impossible to be estimated with certainty by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances and, therefore, better able to compute the actual or probable damages than courts or juries from any evidence which can be brought before them. In all such cases the law permits parties to ascertain for themselves and to provide in the contract itself the amount of the damages which shall be paid for the breach." (*Jacquith v. Hudson, supra*, 137.) In determining whether a sum named is a penalty or liquidated damages, not only the words employed in the contract, the subject-matter thereof, the sum named therein, but also the circumstances surrounding the making thereof may be taken into consideration. (*Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, 58.) "Where it is ascertainable from the terms of an agreement, construed in the light of the surrounding circumstances under which it was made, that a sum of money is agreed upon by the parties as the measure of damage which will be sustained by the non-performance of that agreement, and the sum thus agreed upon under the circumstances is not so excessive as to shock the moral sense, courts will hold the parties to their agreement and keep them bound by their contract." (*Dunn v. Morgenthau*, 73 App. Div. 147.) "Whenever the damages flowing from the breach of a contract can be easily established, or the damages fixed are, plainly, disproportionate to the injury, the stipulated sum will be treated as a penalty. Where, however, the damages resulting from the breach would be uncertain, or difficult, if not incapable of

Second Department, February, 1912.

[Vol. 149]

ascertainment, then the agreement of the parties liquidating them, in anticipation, will be enforced." (*Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479; *Ward v. Hudson River Building Co.*, 125 id. 230.) Given parties competent to contract, there is no reason why damages of this uncertain character should not be the subject of an agreement, provided the meeting of the minds is not the result of fraud, misrepresentation or undue influence. Counsel for respondent contends that the clause with reference to liquidated damages relates only to that portion of the contract providing for the payment of a fixed weekly sum as compensation. This would involve reading into the contract words which are not written therein, and would be contrary to the clear intent of the parties so far as the same is disclosed. If the only measure of compensation for plaintiff's services were a fixed weekly sum, the actual damages resulting from a wrongful discharge would be comparatively easy of computation. But the payment of a proportionate part of the profits of the business is as much a part of plaintiff's compensation as the payment of a specified weekly amount. With regard to the loss of profits, much difficulty might arise in determining the actual results following a breach. If plaintiff were wrongfully discharged at the end of a month, it might be that there would be no net profits for the remainder of the period specified in the contract, but that might be due to the fact that a business which under plaintiff's care and attention would have yielded large returns became unprofitable through being deprived thereof. So if plaintiff were disloyal to her employers, and violated the obligations which the contract imposed upon her, a business which had theretofore yielded large returns might be conducted at a loss. This was peculiarly a case where the parties might agree upon a specified sum by way of damages in the event of a breach. Each realized that, as a result of such agreement, the party guilty of a breach might be compelled to pay more than the actual damages resulting therefrom, which it was possible to establish by competent evidence, or the party suffering from such breach might recover less. Each accepted this lawful hazard, and both must be held to the agreement which was made.

App. Div.] Second Department, February, 1912.

We conclude, therefore, that for a breach of the contract plaintiff's entire compensation must be limited to the sum named as liquidated damages. That portion of the complaint now under consideration stated as a second cause of action cannot be construed as an action to recover the sum named as liquidated damages, for there is no allegation of the non-payment thereof. "Upon an ordinary contract for the payment of money, non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action, and being such within the rule of the Code it should be alleged in the complaint." (*Lent v. N. Y. & M. R. Co.*, 130 N. Y. 504, 510; *Bacon v. Chapman*, 85 App. Div. 309; *Dickinson v. Tysen*, 125 id. 735; Bradb. Rules Pl. 78.) It is true that when a complaint contains an allegation of non-payment, that allegation is not put in issue by a general denial (Bradb. Rules Pl. 1285), but the defense must be affirmatively pleaded, and the burden of proof with respect thereto rests on the defendant. (*Lent v. N. Y. & M. R. Co.*, *supra*; *Conkling v. Weatherwax*, 181 N. Y. 258, opinion of CULLEN, Ch. J., 268; *Lynch v. Lyons*, 131 App. Div. 120.) Although it may be somewhat illogical that plaintiff should be obliged to allege non-payment, and yet the defendant be required to affirmatively prove payment, the rule respecting pleading is now well settled, and as stated by Chief Judge CULLEN (*supra*), "It is of little consequence how it is settled provided it stays settled."

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

JENKS, P. J., HIRSCHBERG, WOODWARD and RICH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

MARY C. FLYNN and Others, Appellants, *v.* JOHN C. JUDGE,
Respondent.

Second Department, February 2, 1912.

Decedent's estate — executor and administrator — action against attorney for negligence — burden of proof — appeal — evidence — damages — commissions of executors — liability of attorney for advising client to testify falsely.

Where executors and trustees, who have been removed by the surrogate for incompetency, bring an action against their attorney for negligence, alleging, *first*, defendant's lack of due care and diligence in the matters submitted to him in relation to the administration of the estate resulting in their removal and loss of commissions; *second*, alleging lack of skill and diligence in the preparation, filing and presentation of their account, resulting in their being charged personally with the costs, the burden is upon the plaintiffs to prove the breach of duty on the part of the defendant and the amount of damages.

Upon an appeal from the dismissal of the complaint at the close of the plaintiff's case in such an action, every fair intendment arising upon the evidence must be given to them. Evidence examined, and *held*, that the plaintiffs should have a new trial.

In the first cause of action the measure of damages is the difference in the pecuniary position of the client from what it would have been had the attorney acted without negligence.

Damages for loss of commissions, past and prospective, are so uncertain as to their character that they should not be allowed.

Commissions of executors and trustees are not a matter of right, but rest in the discretion of the surrogate.

It seems, that if, in the second cause of action, the plaintiffs can establish that their pecuniary loss was due to the lack of care, skill and diligence of the defendant in the preparation, filing and presentation of their account, they may recover.

It seems, that an attorney who advises a client, an executor, to testify falsely in a matter under his supervision, violates his retainer and damages resulting therefrom may be actionable.

APPEAL by the plaintiffs, Mary C. Flynn and others, from part of a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 19th day of March, 1910, upon the dismissal of the complaint as to the first and second causes of action by direction of the court at the close of the plaintiffs' case on a trial at the Kings County Trial Term.

App. Div.] Second Department, February, 1912.

John Delahunty [S. P. Cahill with him on the brief], for the appellants.

John C. Judge [Frank C. McKinney, Raymond D. Thurber and George I. Woolley with him on the brief], for the respondent.

PER CURIAM:

The plaintiffs' appeal is from a judgment that dismissed them as to the first and second causes of action. The third cause of action was eliminated by adjustment. A decree of the Surrogate's Court removed the plaintiffs as executors and trustees of the estate of their father. The defendant for a time was their attorney and counsel. The first cause of action alleges generally defendant's lack of due care, skill or diligence in the matters submitted to his advice or intrusted to his charge in relation to the administration of the estate. It also specifies instances thereof, and charges that in consequence of these acts and others on the part of the plaintiffs in their representative capacities, there was revocation of their letters and removal of them. It alleges that they had suffered and would suffer great damage and will be deprived of their yearly commissions as executors and trustees, and by reason of the premises the damages are and will be \$10,000. The second cause of action alleges lack of due care, skill and diligence in the preparation, presentation, and in matters relating to the proceedings to settle judicially the accounts of the executors, so that the account presented was futile and of no benefit to the plaintiffs, but of great loss and damage to them in that they were compelled to pay the entire costs of the proceedings and deprived of their commissions and of their costs and allowances to the amount of \$1,904.79.

The theory of the action is negligence. At trial the learned counsel for the plaintiffs said that they were "merely claiming for bad legal advice," and again, "I know of no reason why Mr. Judge should be charged with dishonesty. I am not charging him with dishonesty." And in his points on this appeal his contention is that all of the acts of misconduct which the surrogate found against the plaintiffs in his decree of removal and revocation were "due solely to the advice of

Second Department, February, 1912.

[Vol. 149.]

the defendant." Upon the determination of this appeal which challenges the propriety of dismissal at the close of plaintiffs' case, every fair intendment arising upon the evidence must make for them. The burden was upon them to prove the breach of duty and the amount of damages, and they could only recover the damages thus proved. (*Vooth v. McEachen*, 181 N. Y. 28.) At trial the counsel for the plaintiffs admitted that the only damages alleged were loss of commissions and moneys chargeable to the plaintiffs by the surrogate, costs of the action and interest and return of counsel fees which they had paid, and other sums of that character—for the moneys which they were obliged to pay into the estate. Under such circumstances the measure of damages is the difference in the pecuniary position of the client from what it should have been had the attorney acted without negligence. (Bevan Neg. in Law [3d ed.]; Wood's *Mayne Dam.* [1st Am. ed.] § 648; Codery Law Relating to Solicitors, 134; Weeks Attorneys [2d ed.], § 319.) The last writer says: "In actions against attorneys for negligence or wrongs, the debt lost and cost sustained through their negligence furnish, when the action can be maintained, the obvious measure of damages, where this measure definitely exists. In other cases the plaintiff is entitled to be in the same position as if the attorney had done his duty." So far as the damages relate to the alleged loss of commissions, past and prospective, we think that the dismissal of the plaintiffs should be affirmed. Those damages are too uncertain, not as to the amount but as to their character. In the words of GROVER, J., in *Taylor v. Bradley* (4 Abb. Ct. App. Dec. 366): "It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit would be derived at all." Even if the professional advice of the defendant had been beyond hypercriticism and the plaintiffs had continued in their representative capacities, there was no certainty that they might not have been deprived of commissions for reasons entirely foreign to the counsel and advice of their lawyer. Commissions are not a matter of right, but rest in discretion. (*Matter of Rutledge*, 162 N. Y. 31; *Matter of Welling*, 51 App. Div. 355.) Again, it would be almost impos-

App. Div.]

Second Department, February, 1912.

sible to lay the revocation and removal entirely at the door of the defendant. The chief concern of the court in removals is the safety of the trust. (Jessup Surr. Pr. [3d ed.] 1023.) And in the opinion handed down by the learned surrogate it was said: "Under nearly all of the tests suggested by the counsel for the executors and trustees, the relief prayed for should be granted. He concedes their utter inexperience of business and unfitness for their positions, and tenders this as an excuse for their mismanagement. In my opinion, there is '*a clear necessity*' for interference 'to save the trust property and such misconduct as to show want of capacity or fidelity putting the trust in jeopardy. (*Elias v. Schweyer*, 13 App. Div. 336.)" (The italics are ours.)

But the damages alleged in the second cause of action may be regarded in a different light. The plaintiffs upon accounting were charged personally with the expenses thereof, contrary to the general rule. The specific amount of their personal outlay is not hard to ascertain. If the plaintiffs can establish that this pecuniary loss was due to the lack of due care, skill or diligence of the defendant as a lawyer, in the preparation, filing and presentation of the account, we think that the defendant might be held liable. It is not however, to rely upon the revocation of letters and removal, for the plaintiffs might have been charged personally even if they had been continued in these capacities. See *Matter of Gabriel*, 44 App. Div. 623, and cases *idem*, 2nd, 161 N. Y. 644; *Matter of Harnett*, 15 N. Y. St. Rep. 725; *Matter of Long Island L. & T. Co.*, 92 App. Div. 5).

In the same opinion from which we have quoted heretofore, the learned surrogate also wrote: "It is no answer to this application to say that in the end they filed verified accounts which were substantially correct. This was only accomplished by the strenuous efforts of counsel revealing the gross, and as to the executor, William J. Flynn, evidently wilful inaccuracies of the original account, which he endeavored to sustain by confessed perjuries." Reading those findings of the surrogate which relate more particularly to the account, we perceive that he lays stress upon the many delays and obstacles which were interposed by the executors so that the time that intervened

Second Department, February, 1912.

[Vol. 148]

the application for a compulsory accounting and the filing of the account was nearly six months; that in that account the plaintiffs omitted to account for or to charge themselves with the receipts of the testator's business (which they had continued from October 18, 1897, to May 1, 1898, but credited themselves and charged against the general assets of the estate sums paid by them for purchases of stock in the conduct of said business and for the expenses of said business during said period of time aggregating upwards of \$11,000; that they failed to account for certain amounts received by them for debts due the testator at the time of his death, including one item from the Convent of Mercy amounting to \$1,058.38; that they failed and omitted to file proper vouchers in support of the payments and disbursements alleged to have been made by them; that in their account as trustees they credited themselves with disbursements which were also credited in their account as executors; that in neither account they charged themselves with any sums recovered by them or with which they were chargeable as and for interest and income on the personal estate in their hands except \$50 for rent of fixtures and \$125 interest on deposits; that in the account as executors they credited themselves with several items of alleged payments which had already been allowed them in an action for admeasurement of dower; and that it finally appeared that they should have had a balance of \$12,000 as against a stated deficiency of \$4,000 shown in the original account.

The burden upon the plaintiffs in this branch of the case was to establish that the personal charges against them upon the accounting were due to the lack of due skill, care and diligence of their attorney in and about the preparation, presentation, filing and sustention of the account. There must appear such certainty as would satisfy the mind of a prudent and impartial person that the alleged shortcoming of the defendant was the cause of the charge against them. But the question upon this appeal is whether the plaintiff had given sufficient evidence or was halted improperly in offering relevant, material and competent evidence which might have tended to establish this contention, so as to save themselves from dismissal. The features of the account which were accentuated by the learned

App. Div.]Second Department, February, 1912.

surrogate could be traced to the omission of due care on the part of a legal adviser. Delay in the preparation and filing of the account, omissions therefrom, substantial affirmative errors therein, duplications with items in other accounts, wrongful advice in respect to the sustentation thereof, are matters which might naturally be brought home to a legal adviser. And we think that there was sufficient evidence offered or improperly excluded which rendered the dismissal at the time thereof error. The learned trial court seemed to lose sight of the fact that the plaintiffs' claim for damages related *also* to their loss due to the charges against them *personally* upon their official accounting, and to regard the case solely from the viewpoint of the revocation of the letters and the removal and alleged consequent loss of commissions. We are led to this conclusion, not only by the expressions of the learned court, but by a ruling which must also be held erroneous. The witness Brady, who had been in the employ of the plaintiffs' testator, and who was retained by the plaintiffs when they continued their father's business for a time, who kept books wherein were entered receipts from the estate and who rendered statements to the defendant, was asked upon his direct examination, "Do you recall a claim, an amount due from the Convent of Mercy? A. I do. Q. Was that paid? A. Yes, sir; I believe that was paid. Q. Do you recollect whether that was in a statement which you furnished to Judge, the payment of that?" This was met by a general objection. The court then said: "I am simply not going to let you prove that in the account rendered Mr. Judge purposely left out charges or credits that he should have known belonged there, because it is not material, even if you establish that. Mr. Delahunty: I am not seeking to establish that he left them out purposely, but that he left them out negligently. The Court: I will not let you prove either. Mr. Delahunty: Then I except. The Court: The decree of the Surrogate under which all your woes have arisen is not due to that. Mr. Delahunty: I except. The Court: They are due to other things, such as I have pointed out. The principal things were that this Mr. Flynn was guilty of perjury and that the other plaintiffs were incompetent." We fail to see why the fact sought to be proved did not bear upon negligence in respect

Second Department, February, 1912.

[Vol. 149]

to the preparation of the account. It was a feature dwelt upon by the learned surrogate, as we have pointed out. The counsel for the defendant in their printed points write: "*The fifth and last specification of negligence is, the drawing by the defendant of defective and misleading accounts. The evidence on this head is meagre, but possibly sufficient to indicate that the defendant inadvertently omitted from the account essential items which had been furnished him by the plaintiffs, and that they relied upon its correctness when they signed it. Even if this is so, there is no evidence or claim that the defendant, any more than the plaintiffs, deliberately intended to present a false account. In fact, the plaintiffs' express admissions throughout the case acquit the defendant of any intentional misconduct. And no harm actually resulted to the estate, for the Surrogate made the proper corrections before settling the account.*" This is a concession to be considered not alone as to the question of intentional misconduct or of harm to the estate, but of the charge of costs personally upon the plaintiffs in the accounting. And there is another pertinent fact conceded at trial by defendant, that the amended account, which seems to have passed without objection, not prepared by the defendant, was made up from the same data as that supplied to the defendant. This circumstance might well bear upon the competency and care observed in the preparation of the account by the defendant.

As to the alleged perjury, it seems that one of the executors, forced to the answer, testified before a referee upon the accounting that the said witness Brady was a partner in the business continued when he was not. One of the plaintiffs testified that she called the attention of the defendant to that bit of evidence, saying: "You know very well that Phillip Brady is not a partner of my brother's in that business," and the defendant said: "Yes, I know it. I told your brother to say so." The witness said: "Well, my brother must take that back," and the defendant said: "He can take it back on rebuttal." And there was evidence offered that a question and answer among a series prepared by the defendant for the executor on rebuttal did retract or explain that statement. When the offending executor was questioned on this subject the court

App. Div.] Second Department, February, 1912.

checked inquiry avowedly made to show that the original false statement was made upon the advice of the defendant. The learned court stated its view that "to allow the perjurer himself to sue the man who advised him to commit perjury, to recover damages, would be a most monstrous proposition." Without quarrel with the soundness of the general proposition, and without considering a germane limitation in cases of fiduciary relation, it seems to us that the learned court lost view of the purpose and bearing of the testimony. The plaintiffs were not seeking to recover damages for a perjury of one of their number from the inciter of the perjury. They sought to recover what they had been compelled to pay on account of a breach of defendant's obligation as an attorney and counselor at law; and their contention was that as an attorney he advised one of their number to testify falsely in a matter committed to his legal guidance. This was bad or improper advice, in violation of the obligation of the defendant under his retainer, and damage resulting therefrom might, we think, be actionable. (See *Gihon v. Albert*, 7 Paige, 278; also, *Looff v. Lawton*, 97 N. Y. 478, 483.) Justice to a reputable member of our profession makes it proper that we should accentuate the fact that we are not considering the character or the weight of the evidence as to this alleged perjury, but simply the relevancy of evidence adduced or attempted to be adduced by the plaintiff, without having before us any testimony on the part of the defendant as to the truth thereof. As we have said, we have but to consider whether the plaintiffs should have escaped dismissal; nothing more than this. We express no opinion upon the merits of the case beyond the precise question presented.

The judgment must be reversed and a new trial must be granted, costs to abide the event.

JENKS, P. J., HIRSCHBERG, BURR, WOODWARD and RICH, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES E. LYNCH, Appellant, *v.* CALEB E. PIERCE and Others, Constituting the Board of Health of the Village of Peekskill, Respondents.

Second Department, February 2, 1912.

Public health — constitutional law — statute authorizing State Commissioner to appoint local health officers — mandamus to compel appointment to fill vacancy.

Where, after a local board of health passed a resolution, pursuant to section 20 of the Public Health Law, as amended by chapter 383 of the Laws of 1903, declaring that a certain person was nominated for appointment by the State Commissioner as village health officer, said section was declared unconstitutional in so far as it vested power in the State Commissioner to appoint and pass upon the competency of municipal health officers, and a statute was enacted providing that the local board of health shall appoint its health officer, such resolution is rendered invalid and a vacancy created, and a peremptory writ of mandamus may issue to the persons composing the local board of health to compel the appointment of a health officer to fill the vacancy.

APPEAL by the relator, James E. Lynch, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 13th day of April, 1910, denying relator's motion for a peremptory writ of mandamus.

William F. Bleakley, for the appellant.

Leverett F. Crumb [*Cyrus W. Horton* with him on the brief], for the respondents.

JENKS, P. J.:

The relator moved at Special Term for a peremptory writ of mandamus to the persons composing the board of health of the village of Peekskill to appoint a health officer to fill a vacancy "caused by the decision of *Matter of Towne against Porter*, 128 App. Div. 717." The Special Term found that on March 12, 1908, the said board of health passed this resolution: "*Resolved*, pursuant to Section 20 of the Public Health Law as amended by Chapter 383 of the Laws of 1903, that Eldorus De Motte Lyon, M. D., be and he hereby is nominated by this Board for the

App. Div.] Second Department, February, 1912.

position of Health Officer of the Village of Peekskill, for the term of four years, beginning April 1st, 1908, and that the Secretary be and he hereby is directed to forward said nomination for such appointment to Dr. Eugene H. Porter, State Commissioner of Health, on behalf of this Board," and "That said Board of Health intended by said resolution to appoint the said Eldorus De Motte Lyon, Health Officer of the Village of Peekskill for the term of four (4) years. That on or about the 1st day of April, 1908, the said Eldorus De Motte Lyon, duly qualified as Health Officer of the Village of Peekskill, and has continued as such down to the present time, and that he is now such Health Officer." And it determined thereupon as conclusions of law that "the effect of the passage of the said resolution by the Board of Health of the Village of Peekskill was the appointment of the said Eldorus De Motte Lyon as Health Officer in and for the Village of Peekskill for a term of four (4) years, and that the said term of office will not expire until four years from the 1st day of April, 1908, and that there is now no vacancy in said office," and "That the relator is not entitled to a peremptory writ of mandamus as prayed for in his notice of motion and petition." Dr. Lyon was permitted to intervene and to become a party. Section 20 of chapter 661 of the Laws of 1903 (Gen. Laws, chap. 25) provided for the appointment of a local health officer for one year by the village board of health. The said section was amended by chapter 383 of the Laws of 1903, providing that the State Commissioner of Health should appoint for each municipality except cities, on nomination of the local board of health, a competent physician to be health officer of the municipality for the term of four years. Chapter 484 of the Laws of 1904 invested the said State Commissioner with the absolute power of appointment in event of his non-satisfaction with the physician recommended by the local board. These provisions, as re-enacted in 1906 and 1907 (§ 20, as amd. by Laws of 1906, chap. 253, and Laws of 1907, chap. 225), were re-enacted in section 20 of the Public Health Law of 1909 (Consol. Laws, chap. 45; Laws of 1909, chap. 49). After the passage of the resolution in question and an appointment in accord therewith by the State Commissioner, the decision in *Matter of Towne v. Porter* (128 App. Div. 717) was handed down

Second Department, February, 1912.

[Vol. 149.]

that determined that said section 20 of the former Public Health Law, as amended by chapter 383 of the Laws of 1903 and subsequent statutes (*supra*), was unconstitutional in so far as it vested power in the State Commissioner to appoint and to pass upon the competency of municipal health officers. Chapter 165 of the Laws of 1909 (amdg. Public Health Law [Consol. Laws, chap. 45; Laws of 1909, chap. 49], § 20) provided that the local board of health should appoint the health officer. This act took effect on April 6, 1909, and amended the consolidated statute of 1909, which was passed and took effect on February 17, 1909. On April 10, 1909, the relator demanded that the local board appoint such an officer, without result. This motion followed.

At the time of the passage of the resolution the power of the local board as declared by the statutes was to nominate, while the power of appointment was expressly vested in the State Commissioner. This statutory procedure was followed exactly by the local board, for its resolution "nominated" Dr. Lyon for such appointment to the State Commissioner. Two of the members of that local board who voted for the resolution now depose "That it was his intention and desire when he so voted to appoint said Lyon such Health officer." But in the paragraph immediately preceding, each deposes that he "voted for the resolution * * * nominating" Dr. Lyon "for appointment of Health officer." I have no doubt that each affiant desired the appointment of Dr. Lyon and intended to bring about his appointment by nomination to the State Commissioner. But are we to understand that these affiants intended to disregard the statute and to *appoint* Dr. Lyon by that resolution, although they formally obeyed the statute and but "nominated" him to the State Commissioner for the purpose (expressed in the resolution) of appointment by that officer? In other words, had they determined that the statute was unconstitutional, and, although *formally* obeying it, had they made up their minds that by the passage of the resolution they would really appoint the person named therein? I cannot think that these affiants seek to make a declaration in derogation of their official action as evidenced by this formal resolution. They do not pretend that the resolution is not in accord

App. Div.]

Second Department, February, 1912.

with their action, or does not set forth correctly what they did. I think that these affiants should not be heard as to their intent. The principle is expressed generally in Wigmore on Evidence (§ 2471), where it is said: "When a transaction has been even voluntarily embodied in a single document, no other utterance of intent or will on the same subject can be given legal effect. Hence, such a declaration is excluded from consideration even in the process of interpretation, not because it would not for that purpose be useful, but because it would be improper for the other purpose. There being two conceivable purposes for which it could be used, the one proper, the latter improper, it is excluded because of the fear that the latter would dominate and that the temptation to abuse would be too strong." I think that the intention to be derived from this official act was but to nominate for appointment to the recognized appointive officer in accord with the prescribed scheme of the statute. The learned counsel for the respondents mainly relies upon *People ex rel. Kresser v. Fitzsimmons* (68 N. Y. 514). In that case a mayor had the power of appointment of certain officers, but labored under the mistake that his appointments must be confirmed by the common council, and, therefore, submitted "the following nominations" for confirmation to the common council. The court, not without difficulty and with dissent, decided the mayor thereby appointed these persons to office. The reasoning of the court was that the mayor had intended to discharge and had supposed he had discharged his whole duty under the statute in reference to the *appointment*; that the communication might be read as if the mayor had stated that he had made the nominations, and he submitted them for *confirmation*; that the essential thing was the fact of the appointment, and if the paper was signed for the purpose of making or evidencing the appointment, all the rest was formal. The court added: "It cannot be denied that much can be said in opposition to the conclusion we have thus reached. But, in a case like this, where the mayor had the undoubted authority to make the appointments, and exercised that authority at the proper time, and the persons appointed had accepted their offices and entered upon the

Second Department, February, 1912.

[Vol. 149.]

discharge of their duties, disregarding mere matters of form, the action of the mayor must be upheld, if it can be without violating any rule of law, and that it can be thus upheld we think has been sufficiently shown." It may be entirely true that if the law that cast the power of appointment in the State officer was unconstitutional, the power of appointment was actually in the local board at this time, but the point of divergence between the case at bar and *Kresser's* case lies in the difference between the formal acts relied upon. That of the mayor in *Kresser's* case was construed by the court to be an appointment. I again call attention to the language of the court referring to the communications, "They may then be read as if the mayor had stated in them that he had made the nominations of the persons named, and that he submitted them for confirmation or approval." But the resolution in this case cannot, I think, be so read. For it expressly declares that Dr. Lyon was *nominated for appointment* to the State Commissioner. The mayor had the power of appointment and supposed he had the power of appointment subject to confirmation, and he intended an act of appointment. The board had the power of appointment (conceded for the proposition), but supposed it had the power of nomination for appointment by another, and but intended an act of nomination. In discussion of *Kresser's Case* (*supra*) in *People ex rel. Babcock v. Murray* (70 N. Y. 521), the court say that the decision was reached "with considerable hesitation and not without great doubts." And thereafter say: "It is nowhere intimated in the opinion that anything less than a formal paper writing, signed by the official with whom the power of appointment rests, showing clearly his intent to appoint the persons named, and his belief that such writing is that required by the statute, and his intention to make that the final act on his part in perfecting the appointment, will constitute an appointment conferring the office upon the appointees, and such was the paper signed by the mayor in that case, as interpreted and construed by this court." The precise distinction between *Kresser's* case and the case at bar is found in the sentence "showing clearly his intent to appoint the persons named." The choice of a person to fill an office must be, to cite the language of the Court of Appeals in *People ex rel.*

App. Div.] Second Department, February, 1912.

Balcom v. Mosher (163 N. Y. 40), "the discretionary act of the officer or board clothed with the power of appointment; that while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial." The dissent of RAPALLO, J., in *Kresser's Case (supra)*, which is recognized in *Babcock's Case (supra)* as of great force, indicates the importance of this distinction. That great judge said: "The argument in its support is, that inasmuch as the mayor had power to appoint without asking the consent of the common council, his consulting them was a mere superfluity which did no harm. But the answer to this argument is that the mayor did not exercise his power, but submitted the question to the common council. It is by no means certain that if they had rejected his nominations, the nominees would, nevertheless, have been admitted to the office, or even that if the mayor had not supposed a confirmation necessary he would have made the nominations which he did. Both of these propositions must be assumed for the purpose of establishing that the nomination was equivalent to an appointment. When the Legislature has conferred this power upon the mayor, I think he must exercise it and give to the public the benefit of his free choice, and assume the entire responsibility of the selection, and that it is not a compliance with the law to submit the matter to the decision of another body, and thus divide both the power and responsibility."

I think that the mandamus should issue. This was the practice in *Matter of Kelly v. Van Wyck* (35 Misc. Rep. 210), which seems to be recognized without question. (See *People v. Dooley*, 69 App. Div. 518; 171 N. Y. 84.)

The order must be reversed, without costs, and the motion must be granted.

HIRSCHBERG, BURR, THOMAS and CARR, JJ., concurred.

Order reversed, without costs, and motion granted, without costs.

ORANGE COUNTY TRUST COMPANY and FRANK W. HARTMAN, as Executors and Trustees under the Last Will and Testament of POLLY L. MARTIN, Deceased, Respondents, *v.* ALICE B. MILLER and NATHAN W. MILLER, Appellants.

Second Department, February 2, 1912.

Bills and notes — action by executor of payee against maker — partial defense — burden of proof — parol evidence to vary terms of note.

Where, in an action by executors against the makers of a promissory note payable to the plaintiff's testatrix, the answer alleges as a partial defense that at the time of the execution of the note the payee held another note made by the defendants, the amount of which was included in the note in suit, but upon which they had paid a sum of money which was to be credited on the new note, the burden of proving the partial defense is upon the defendants.

It seems, that an oral agreement made by the parties at the time of the execution of a promissory note, is not admissible to vary the terms of the note.

THOMAS and CARR, JJ., dissented, with opinion.

APPEAL by the defendants, Alice B. Miller and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Orange on the 12th day of April, 1911, upon the decision of the court rendered after a trial before the court without a jury at the Orange Trial Term.

Edward E. Conlon, for the appellants.

John Bright, for the respondents.

HIRSCHBERG, J.:

The action is brought on a promissory note made by the defendants to the order of the plaintiffs' testatrix. The note was made on the 29th day of July, 1907, in the sum of \$293.21, payable three months after date, and the judgment is for that amount, with interest and costs, less \$200 paid on account. The testatrix died in March, 1909. The answer alleged as a partial defense that at the time of the execution of the note the payee held another note made by the defendants, the amount of which was included in the note in suit, but upon which they had paid a sum of money which was to be credited on the new

App. Div.] Second Department, February, 1912.

note, though the precise amount of the sum to be credited was not known at the time.

The burden of proving the partial defense was upon the defendants, and it seems clear from the evidence that they have failed to sustain it. A witness testified in their behalf that at the time of the execution of the note in suit it was agreed between the parties that the amount which had been paid on the prior note should be accurately ascertained and indorsed as a payment on the new note. The deceased claimed that such payment amounted to \$75 only, while the defendants claimed that such payment amounted to about \$100. It was stated at the time the new note was given that the prior note was in the bank and that the payments were indorsed on it. No proof was given on the trial as to the amount of such indorsements, but the note in suit bears the indorsement of a payment of \$200 made on July 20, 1908, nearly a year after the note was given and several months after its maturity, which indorsement is in the handwriting of the defendant Nathan W. Miller.

It would seem to be a fair and reasonable presumption that such indorsement included the entire credit to which the defendants were entitled at the time it was made. No evidence was offered to rebut the presumption, and such presumption would seem to be very much strengthened by the additional fact that if the payments on the first note amounted to \$100, as claimed by the defendants, and such payments were not included in the \$200, the entire note must have been practically paid on July 20, 1908.

The evidence as to the contemporaneous oral agreement at the time of the execution of the promissory note in suit was objected to by the plaintiffs and received over such objection. Aside from the question of presumption I regard it as very doubtful whether it was competent for the defendants to vary the terms of the note by proof of the conversation between the parties at the time of its execution. As was said by Judge WERNER in *Jamestown Business College Assn. v. Allen* (172 N. Y. 291, 294): "The general rule, that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms, applies to promissory notes and bills of

Second Department, February, 1912.

[Vol. 149.]

exchange. (*Thompson v. Ketcham*, 8 Johns. 148; *Norton v. Coons*, 6 N. Y. 33; *Read v. Bank of Attica*, 124 N. Y. 671.)"

The judgment should be affirmed.

WOODWARD and RICH, JJ., concurred; THOMAS, J., read for reversal, with whom CARR, J., concurred.

THOMAS, J. (dissenting):

The evidence shows without contradiction that the defendant Nathan W. Miller was indebted to plaintiffs' decedent upon a bond and mortgage, and that to meet a balance due and remove the lien, Miller and decedent met with the witness Williams; that a note was proposed for the above purpose; that the decedent insisted that there should be included in the note another outstanding note of \$125, on which it was conceded that \$75 had been paid, on which Miller claimed that a further sum of \$25 had been paid; that it was finally agreed that the whole amount of the first note, which was not present, should be included in the note in suit, and that the amount indorsed on the first note should be ascertained and indorsed on the note in question. The only indorsement on the note in question is for \$200, which is indorsed on the note as of July 20, 1908, in Nathan Miller's handwriting, and alleged in the complaint and presumed by the law to have been paid on that day. After bringing the defendant to court on such an allegation, the plaintiff would on the trial withdraw it and ask the court to presume from the indorsement made by defendant that the \$200 was not in its entirety paid on that day, but that it included all earlier payments made by defendant on the first. Thus, the maker, incompetent as a witness to testify to a personal transaction with the decedent, is compelled to meet an issue that did not exist under the pleadings. That is not just or technically correct. The further contention that the evidence is incompetent in that by parol it disputes the note, is not tenable, as the answer states facts that show partial failure of consideration and the uncontradicted evidence proves it.

The judgment should be reversed and a new trial granted, costs to abide the event.

CARR, J., concurred.

Judgment affirmed, with costs.

App. Div.] Second Department, February, 1912.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
LOUIS BLOOM, Appellant.

Second Department, February 2, 1912.

Crime — information charging attempt to bribe another to commit perjury — evidence.

An information for violation of section 813 of the Penal Law, which among other things, charges that defendant attempted to bribe M., the owner of a truck that had been stolen, to procure his servant, G., the driver thereof, when subpoenaed as a witness, to commit perjury and to fail to identify at the examination before the magistrate one K., who had been seen with the truck and arrested, sufficiently charges an attempt to incite G. to commit a crime, although there is no evidence that G. had any knowledge of the larceny.

Evidence examined, and *held*, insufficient to sustain a conviction under the above information.

APPEAL by the defendant, Louis Bloom, from a judgment of the Court of Special Sessions of the city of New York, borough of Brooklyn, rendered against the defendant on the 9th day of December, 1910, convicting him of a violation of section 813 of the Penal Law.

Charles O. Maas [Isaac Siegmeister with him on the brief], for the appellant.

Peter P. Smith, Assistant District Attorney [John F. Clarke, District Attorney, with him on the brief], for the respondent.

THOMAS, J.:

Information was filed against the defendant for violation of section 813 of the Penal Law. That section in brief makes a person guilty of a misdemeanor who, without giving, offering or promising a bribe, incites or attempts to procure another to commit perjury, or to give false testimony as a witness, although the latter do neither, or to withhold true testimony. The information, among other things, charges that defendant attempted to bribe Meyer, the owner of a truck that had been stolen, to procure his servant, the driver thereof, when subpoenaed as a witness to commit perjury and to fail to identify at the examination before the magistrate one Katz, who had

Second Department, February, 1912.[Vol. 149.]

been seen with the truck and pointed out to the police by the driver, and arrested. The evidence of Meyer was sufficient to show that the defendant did offer Meyer \$250 if he would induce the driver in court before the magistrate to say that he was not sure that "them is the two prisoners." Meyer's two sons testified, one that the defendant offered to give the money "providing they could fix the case up," and the other that he would give that sum "to instruct your driver to drop the case." This was an attempt to bribe Meyer to get Gottlieb to do something to help Katz — but what does not appear very clearly. Although it does appear in the record that Katz had been arrested, and that his case did in fact come up the next morning after the conversation between Meyer and defendant, there is no evidence that Gottlieb had any knowledge of the larceny, or that, if he had testified that he was not sure "them is the two prisoners," he thereby would have committed perjury or otherwise violated the statute, or that the defendant's suggestion to Meyer involved such violation. The evidence does not support the charge. But is the information well laid under that section? Is it an offense *thereunder* if A solicit B to entice C or attempt to procure C to do or not to do the things stated in the section? If A solicit B to entice C to give false evidence and B does so entice him, A is equally guilty with B. If A solicit B to commit a crime, it is indictable at common law, as where one advises a servant to rob his master (*The King v. Higgins*, 2 East, 5), or one requests another to set fire to a third person's building, later furnishing him a match for the purpose. (*People v. Bush*, 4 Hill, 133.) But I meet no decision that, if A solicit B to solicit C to do a criminal act, for example, to burn his master's barn, A is guilty of soliciting C to so burn the barn, although A would be guilty of soliciting B to do a criminal act. Hence helpful principles should be considered. The act need not be proximate in time to the crime committed to implicate the actor; but it must be causatively proximate. (Bish. New Crim. Law, § 764, subd. 2.) The act indicating the attempt should be such that, if the crime had been committed, it was apparently adapted to affect the result (Bish. New Crim. Law, § 765), and was intended for that purpose. Moreover,

App. Div.] Second Department, February, 1912.

the act in time and place must be in "the direct movement toward the commission" of the crime. (*People v. Murray*, 14 Cal. 159, 160.) In *People v. Bush* (*supra*) it is said: "An attempt may be immediate—an assault, for instance; but it very commonly means a remote effort, or indirect measure taken with intent to effect an object." If the crime be committed, the act charged against the defendant need not be the first act before the crime, nor the second or third or in any other numerical order before it, if it is a force guiltily set in motion that in the end induced the commission of the offense, or brought the actor in guilty association with one or more who committed the offense. For example, if A should solicit B to solicit C to solicit D to kill E, and D did kill E, A would under our law be a principal offender. If this be true of the crime actually committed, it logically follows that the complicity would be the same if A should solicit B to solicit C to solicit D to kill E, although the chain of solicitations should be interrupted by the refusal of any person solicited to do the act. A's solicitation of B is intended to be carried through others to D, and the fact that B fails to continue it does not change the quality of A's act of solicitation, but interrupts its falling on D as intended. If it be carried to D and he refuse, then A's attempt fails later in time, but remains an attempt. When a crime is not committed, "those who have unsuccessfully solicited or incited another to commit it are, at common law, guilty of an indictable misdemeanor (whether the crime to which the solicitation or incitement related is either by common law or statute a felony or a misdemeanor)." (*Russ. Crime*, 203.) I conceive that there would be no distinction in criminality whether A, B, C and D should meet and concert measures whereby D should kill E, or whether A should initiate the crime with B, whereby it would be carried through C to D. It is not necessary that the solicitation of B should reach D to implicate A. In *Rex v. Banks* (12 Cox Crim. Cas. 393) the defendant's letter to a woman to murder a child did not reach her but was intercepted at the house where the addressee lived. The defendant was convicted of an attempt to solicit and incite B to murder. So in *Regina v. Ransford* (13 Cox Crim. Cas. 9) the defendant's letter reached

Second Department, February, 1912.[Vol. 149.]

the addressee, but he, not reading it, delivered it to authorities. The defendant was convicted of an attempt to incite the addressee to commit an offense. In the case at bar the defendant's solicitation of Meyer was not carried to Gottlieb, nor did Meyer act upon it, but it was none the less an attempt to incite Gottlieb, which failed before reaching him. The Penal Law (§ 2) defines an attempt to commit a crime as "An act, done with intent to commit a crime, and tending but failing to effect its commission." If defendant solicited Meyer, whose truck had been stolen and who was Gottlieb's master, to withhold knowledge that he had, he did an act tending to incite Gottlieb in violation of section 813 of the Penal Law, that is, to commit a crime, and I consider that it is not different than if a letter tending to so incite Gottlieb had been posted but had not reached him, or had been seized in the mail by the government. It may be that, in view of the words used in section 813, an undelivered letter would not sustain an indictment of inciting, but it would sustain an attempt to incite. In *Rex v. Krause* (66 Just. Peace [1902], 121) the defendant was indicted in that he did solicit, persuade, endeavor to persuade and did propose to another to kill a third person, and also there were counts that he wrote and sent by post certain letters with intent to move, solicit and incite another to kill such person. Thus the inciting and attempt to incite are both plead. The statute (24 & 25 Vict. ch. 100, § 4) provided, "whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any Person, to murder any other Person, * * * shall be guilty of a Misdemeanor." Lord ALVERSTONE said: "I think there must be some communication to the person in order to constitute the statutory offense," but submitted the case under the counts as to attempt, and the defendant was convicted, although it was not proved that the letters reached the person solicited. The argument for the defendant was that the mind of the man solicited should be reached, that the words "solicit," "encourage," "persuade" and "propose to" all imply argument addressed to and reaching the mind of the person addressed, and the court said: "I think that the words 'endeavor to persuade' in the statute are descriptive of the character of the offense which involves direction to a particu-

App. Div.] Second Department, February, 1912.

lar person, and in my opinion the words have the same meaning as the words ‘encourage,’ ‘solicit,’ ‘persuade’ and ‘propose to.’” But it is enough that in the case at bar the information sufficiently charges an attempt to incite, and this does not require that the solicitation should be brought to the person to be finally reached. While the judgment of conviction should be reversed and a new trial ordered for failure of proof, the information is sustained so far as it charges an attempt.

JENKS, P. J., CARR, WOODWARD and RICH, JJ., concurred.

Judgment of conviction of the Court of Special Sessions reversed and new trial ordered.

MATTHEW COLEMAN, Appellant, v. JAMES MCCLENAHAN,
Respondent.

Second Department, February 2, 1912.

Contract — agreement to furnish information on which recovery on a judgment may be secured.

An estate of which the defendant was executor held a judgment against a certain company which became insolvent and was dissolved and its property sold by a receiver, including that upon which the judgment was a lien. Plaintiff's brother also held a judgment against the same company and after the receiver's sale brought an action to test the lien of his judgment, and the Court of Appeals sustained his contention that the receiver's sale was subject to the judgment liens.

Immediately thereafter the plaintiff entered into a written contract by the terms of which the defendant agreed to pay the plaintiff one-half the amount recovered on the judgment held by the estate, providing such recovery was the result of facts and information furnished by the plaintiff to the attorney for said estate. The full amount of the judgment was thereafter recovered through the information imparted by the plaintiff and his attorneys, and the property was purchased by the defendant, but before the time to redeem expired a mortgage on the property, known to the defendant to be a prior lien, was foreclosed, thereby cutting off defendant's rights under the execution sale. In an action upon the contract,

Held, that the rights of the plaintiff thereunder were in no manner affected by the mortgage foreclosure or sale thereunder and that a dismissal of the complaint was error.

WOODWARD, J., dissented, on opinion at Special Term.

Second Department, February, 1912.

[Vol. 149.]

APPEAL by the plaintiff, Matthew Coleman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 30th day of April, 1910, upon the decision of the court, rendered after a trial at the Kings County Trial Term, both sides having moved for the direction of a verdict at the close of the case, dismissing the complaint upon the merits.

John A. Dutton, for the appellant.

Thomas J. Farrell, for the respondent.

RICH, J.:

This appeal is from a judgment dismissing plaintiff's complaint upon the merits at the close of the evidence, and upon the request of both parties for a direction of a verdict. The action is upon a written contract, by the terms of which the defendant undertook and agreed to pay to the plaintiff one-half of the amount recovered by the estate of David Stevenson, of which the defendant was an executor, upon a judgment owned by said estate against the Mutual Brewing Company, providing such recovery was the result of facts and information furnished by the plaintiff to the attorney for said estate. At the time this contract was made there were outstanding and unsatisfied judgments against the Mutual Brewing Company aggregating several thousand dollars, which were liens upon real property of the judgment debtor. The first was owned by Denis Coleman, a brother of the plaintiff; the second judgment in priority was in favor of the defendant and his coexecutor for \$2,744.07. The last judgment was recovered on or about July twenty-sixth following. Thereafter the brewing company became insolvent and was dissolved in an action brought by the Attorney-General for that purpose, and a receiver was appointed who sold all of its property, including that upon which the judgments were liens. It was assumed by the judgment creditors (except Coleman) that this sale cut off the judgment liens. Coleman, however, commenced a proceeding to test the lien of his judgment, and the Court of Appeals in April, 1903, sustained his contention that the receiver's sale was subject to the judgment liens. (*Matter of Coleman*, 174 N. Y. 373.) Immediately thereafter

App. Div.] Second Department, February, 1912.

the plaintiff entered into an agreement to furnish information on which a recovery of the money unpaid on said judgment might be made, as follows:

“ESTATE OF DAVID STEVENSON,

“OFFICE 521 10TH AVENUE,

“Telephone No. 353-38. “NEW YORK, May 25, 1903.

“Mr. MATTHEW COLEMAN,

“71 First Place, Brooklyn, N. Y.:

“DEAR SIR.—The Estate of David Stevenson having a judgment for \$2,744.07 entered June 13th, 1893, against the Mutual Brewing Co., and you having stated to me that you thought you could recover some part or all of said judgment with interest, I hereby agree to give you fifty per cent of amount recovered, you to furnish the facts and such information to our counsel, Wm. G. McCrea, without cost to above estate.

“Yours Respy

“JAMES McCLENAHAN, Ex.”

The plaintiff thereupon informed the defendant and Mr. McCrea of the Court of Appeals decision, which, as he understood it, made the judgment good. McCrea thereupon proceeded to act upon the information; he procured a modification of the existing injunction restraining the creditors from proceeding against the brewing company, issued execution upon the judgment and placed it in the hands of the sheriff before the day upon which the sale of the realty under the Coleman judgment was advertised. Two sheriff's sales were made, one under the execution issued on the Coleman judgment, at which the property was bid off by McCrea for \$24,000, which was advanced by the defendant. The money was paid to the sheriff, who executed and delivered a certificate of such sale to McCrea, who immediately assigned the same to the defendant. This sale included the Stevenson judgment. At the other sale, made under executions issued on other judgments, the property was bid off by the defendant for \$4,400 and the money paid by him to the sheriff, who executed and delivered a certificate of such sale to the defendant. Out of the money realized on the first sale the sheriff paid to McCrea as attorney for the Stevenson executors the full amount of the Stevenson judg-

Second Department, February, 1912.

[Vol. 149.]

ment, and the attorney paid the same to the defendant, who received it as one of the executors. The execution was thereupon returned fully satisfied and the judgment was satisfied of record. Before the time to redeem had expired a mortgage on the property, which was a prior lien to that of the judgments, was foreclosed, the property sold and the judgment liens, as well as the rights in the property of the defendant under his certificates, cut off and extinguished. Upon these facts the learned trial justice held that the Stevenson judgment was not recovered nor any part thereof collected by or in behalf of said estate within the intent or meaning of the contract between the parties and upon that ground dismissed the complaint. In this conclusion I think the trial court erred. The test is whether there was a recovery within the meaning of that word in the contract by the Stevenson estate and not whether the defendant profited or lost through his advancement of the money and speculative purchase of the property. It is undisputed that the property upon which the judgment was a lien was sold to the defendant and paid for by him, and that out of the avails the Stevenson judgment was paid in full. The contract is plain and unequivocal; the full amount of the Stevenson judgment was actually received and retained by the executors of that estate and the judgment satisfied and extinguished; this was accomplished through the information imparted by plaintiff and his attorneys to the defendant and the attorney of the Stevenson executors in the performance of the contract. The defendant knew of the existence of the mortgage subsequently foreclosed when he purchased the property at the sheriff's sales. The property sold was a brewing plant. The defendant was the president of a large plant of the same kind and character and was conversant with the value of that kind of property. He considered its value considerably greater than the mortgage debt, and testified that his object in purchasing was that Mr. Coleman and himself might make something out of the judgments. He might have protected himself at the foreclosure sale by bidding the property in. He did not see fit to do this, however, and the fault, if there was any, was his own. I am unable to see that the rights of the plaintiff under his contract were in any manner affected by the mort-

App. Div.] Second Department, February, 1912.

gage foreclosure or sale thereunder, and it follows that the judgment must be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., HIRSCHBERG and THOMAS, JJ., concurred; WOODWARD, J., dissented on the opinion of Mr. Justice SCUDER at Special Term.

Judgment reversed and new trial granted, costs to abide the event.

In the Matter of the Application of DAVID BLUMBERG, Respondent, for an Order Discharging a Mechanic's Lien Filed by SAMUEL SHERUSKY and Assigned to LENA GREENBAUM, Lienor, Appellant. (Appeal No. 1.)

Second Department, February 23, 1912.

Mechanic's lien — process — notice of justification of sureties — service on non-resident — service by mail unauthorized.

The provisions of the Lien Law governing service upon the lienor of notice of justification of sureties on an undertaking given to discharge a mechanic's lien do not authorize the court to direct a foreign lienor to be served by mail.

Where a statute is silent as to the character of service it must be personal. When it prescribes a method of service that method must be strictly pursued.

It seems, that where the lien is upon lands within this State service of said notice could be made by mail if authorized by the statute. But in the absence of a provision for such service, it should be made upon a non-resident lienor as required by the statutes of his own State.

APPEAL by the assignee and lienor, Lena Greenbaum, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 30th day of December, 1911.

Marshall Snyder, for the appellant.

Arthur G. Fuchs, for the respondent.

JENKS, P. J.:

This appeal is from an order of the Special Term that denies a motion to vacate an order for the discharge of a mechanic's

Second Department, February, 1912.

[Vol. 149.]

lien upon execution of an undertaking. On August 23, 1911, the lienor assigned the lien to Lena Greenbaum. The assignment stated that her residence was "at 2140 Crystal Street, in the City of Chicago, State of Illinois," and was indorsed "George C. Schnitzer, 26 Court St., Brooklyn, N. Y." On August 30, 1911, the owner of the premises obtained an order *ex parte* at Special Term that determined the amount of a bond to be given to discharge the lien, and directed that a copy of the bond with notice of justification of the sureties be served upon the claimant and assignee, Lena Greenbaum, "by depositing in the General Post Office of the Borough of Brooklyn, County of Kings and State of New York, a copy of such notice of such bond contained in a securely postpaid wrapper, together with a copy of this order, directed to said claimant and assignee, Lena Greenbaum, at No. 2140 Crystal Street, City of Illinois, and State of Chicago" (*sic*). The undertaking was filed on August 30, 1911, and on that day the attorney for the owner made affidavit that he had served a copy of an annexed notice of justification and undertaking and a copy of the order "fixing the amount of the undertaking upon Lena Greenbaum, the claimant and assignee of the Mechanic's Lien herein, by depositing the same in the General Post Office of the Borough of Brooklyn, County of Kings, and State of New York, in a securely postpaid wrapper addressed to said Lena Greenbaum, to wit—No. 2140 Crystal Street, City of Illinois and State of Chicago" (*sic*), which is a direct mail communication between said points." On September 6, 1911, the Special Term made an order upon the approval and filing of the bond that discharged the lien. On November 28 an attorney who appeared for the said Lena Greenbaum specially to vacate the order and to reinstate the mechanic's lien, moved for that relief, but the motion was denied on December 29, 1911. Theretofore a motion had likewise been made to vacate the order of September 6 and to reinstate the lien, which had been denied on December 23, 1911.* An affidavit of Lena Greenbaum was submitted to the effect that she never had received any notice of justification and that she was not aware at any time before October 19, 1911, that the lien

* See 149 App. Div. 926.—[REP.]

App. Div.] Second Department, February, 1912.

had been bonded, discharged and canceled of record, when she was informed by an attorney of the city of New York, whom she had retained, of these facts. That attorney by affidavit sustained her as to the source of her information. The question of the power of the court was presented.

The provisions for notice of justification of the sureties are contained in section 19 of the Lien Law. The general provision is as follows: "A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time." This contemplates personal service upon the lienor or his attorney. (*Matter of Sullivan*, 31 Misc. Rep. 1, and cases cited; affd., 53 App. Div. 637; Nichols N. Y. Pr. 647, and cases cited.) There is no contention that such service was made in this proceeding. The further provision for service is as follows: "If the lienor cannot be found, or does not appear by attorney, such service may be made by leaving a copy of said undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the State as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person serving the papers or directing the service had knowledge to the contrary." Respondent contends, "It is apparent from the context of Section 19, Subdivision 4, Mechanic's Lien Law, 1909, and the circumstances surrounding the case at bar, that it was legal and proper" for the court to direct the said service by mail. And his argument is that as the assignee and lienor is a resident of Chicago, Ill., with no place of abode within the State where service could be effected, it was legal and proper to direct service "in such manner as the court may direct." The expression "apparent from the context [of the statute] and the circum-

Second Department, February, 1912.

[Vol. 149.]

stances surrounding the case" is that used by the Court of Appeals in *Steinhardt v. Bingham* (182 N. Y. 329). I cannot see aught in the context of the statute that avails the respondent. As I have said, when the statute is silent as to the character of service, it must be personal. When it prescribes the method of service, that method must be strictly pursued. (*Reg v. Meath*, 2 Ir. Rep. 21; *Allen v. Strickland*, 100 N. C. 225; Phillips Mech. Liens, § 321.) The latter provision quoted is limited to cases when the lienor cannot be found or does not appear by attorney (which seems to be this case, if it is within the purview of the provision at all), and the service is to be made by leaving a copy of said undertaking and notice at the lienor's place of residence with a person of suitable age and discretion therein. And it is only under the further condition that if the house of the lienor's abode is not stated in said notice of lien, and is not known, any discretion as to the manner of service is conferred on the court. We may infer from the terms of the order, although the papers of application are not in the record, that it rests upon the showing that the residence of the lienor was known. Moreover that fact appears in the assignment of the lien. "The circumstances surrounding the case" would not justify departure from the terms of the statute, which are plain. It may well be that it is more convenient to reach this assignee by mail, but the argument of convenience has no place when the statute is clear and explicit. In *Putnam v. Longley* (11 Pick. 487) the court say: "It is said that this construction will be attended with great inconvenience, especially where the creditors are numerous, and could not have been intended by the Legislature. The argument from inconvenience may have considerable weight upon a question of construction where the language is doubtful; it is not to be presumed, upon doubtful language, that the Legislature intended to establish a rule of action which would be attended with inconvenience. But where the language is clear, and where of course the intent is manifest, the court is not at liberty to be governed by considerations of inconvenience." We must take into consideration that this is a proceeding for the benefit of the owner of the premises, and that, therefore, he should be held to strict observance of the statutory require-

App. Div.] Second Department, February, 1912.

ments thereof. (Phillips Mech. Liens, § 303a.) The lienor here is virtually brought into court by the notice in question for the opportunity of exercising the substantial right to examine into the validity of the undertaking which lifts the lien, and it would follow that the statute that provides for such notice must be followed in "every essential particular." (*Seymour v. Judd*, 2 N. Y. 464, cited in *Merritt v. Village of Portchester*, 71 id. 309, 311; Endl. Interp. Stat. § 435.) Service in this case can be made in the State of Illinois in the manner prescribed by the statute, inasmuch as the lien is primarily a charge upon land within the State over which our courts have complete control. (Phillips Mech. Liens, § 331, and cases cited.) And so it could be made through the mails if the statute had so provided.

I think that the order must be reversed, with ten dollars costs and disbursements, and the motion to reinstate the lien must be granted, with ten dollars costs.

THOMAS, CARR and WOODWARD, JJ., concurred; BURR, J., not voting.

Order reversed, with ten dollars costs and disbursements, and motion to reinstate lien granted, with ten dollars costs.

CAROLINE S. POPPENHUSEN, Appellant, *v.* CONRAD H. POPPENHUSEN and Others, Respondents, Impleaded with LONG ISLAND RAILROAD COMPANY, Respondent, Appellant.

Second Department, February 23, 1912.

Real property — dower — corporation — conveyance of land to officer in trust for corporation — passive trust — action by officer's wife for dower — evidence — minute books of corporation — resolution authorizing conveyance.

Where land of a corporation is conveyed to one of its officers in trust for its benefit, the title is vested in the corporation, the trust being a passive one.

Where in an action by the widow of P. for dower it appears that in 1869, at the time of the consolidation of two railroad corporations, one of them conveyed the land in question in trust for its benefit to P., who was at the time a director or officer in both companies; that the grantee did not retain possession of the deed, and where, notwithstanding the service of

Second Department, February, 1912.[Vol. 149.]

the notice, the deed was not produced at the trial, and it appears that after most careful search it could not be found by the defendant, the new company; that it might have been destroyed by the burning of one of defendant's buildings in which similar documents had been stored, and that it was on a list of deeds and papers kept by the defendant's counsel, the defendant may not complain because the court upon rendering judgment against the plaintiff dismissed a counterclaim that the heirs of P. convey to defendant the land, the deed of which to P. had been recorded, for, if there was a cloud upon the title, it was by the act of defendant's predecessor.

The error, if any, in permitting a witness who was secretary, director and counsel of the corporation when it conveyed the land in question to P., to read from its minute book of the election and resignation of officers, of which he had no personal knowledge, is harmless where he testified that he knew that the men took charge of the affairs of the corporation and that he also had business relations with them thereafter, the fair intendment being that P. acted upon resolutions appearing in the book. The resolution of the corporation authorizing the conveyance of the land in question to P. was admissible in evidence when sufficiently identified, it appearing that his relation to the resolution was such as to make it competent and relevant to the deed taken by him.

Evidence as to the authority given by the then president of the corporation, when P. was not present, to buy the land was also admissible as it was from that transaction that the title of P. arose.

APPEAL by the plaintiff, Caroline S. Poppenhusen, from a judgment of the Supreme Court in favor of the defendant Long Island Railroad Company, entered in the office of the clerk of the county of Queens on the 23d day of September, 1910, upon the decision of the court rendered after a trial at the Queens County Trial Term, a jury having been waived, and also from an order entered in said clerk's office on the 14th day of October, 1910, denying the plaintiff's motion to strike out certain evidence.

Appeal by the defendant, the Long Island Railroad Company, from that part of the said judgment which dismisses the said defendant's counterclaim.

Lewis R. Conklin, for the appellant Caroline S. Poppenhusen.

James W. Treadwell [*Joseph F. Keany* with him on the brief], for the respondent, appellant, Long Island Railroad Company.

Eugene H. Hatch, for the respondents Poppenhusen.

App. Div.] Second Department, February, 1912.

THOMAS, J.:

The plaintiff, widow of Herman C. Poppenhusen, whose heirs at law are the defendants, Conrad H., P. Albert and Herman A. Poppenhusen, brought this action for an admeasurement of dower of land in possession of the Long Island Railroad Company, and to recover mesne profits. Defeated in this she has appealed from the judgment against her and an order denying her motion to strike out evidence, while the company has appealed from so much of the judgment in favor of the defendants Poppenhusen as dismisses, with costs, the counter-claim that the heirs convey to the company the land of which there exists a recorded deed to their father, which is alleged by the company to have been conveyed to him in trust for its predecessor.

The plaintiff alleges seizin in her husband at his death, descent in the heirs subject to dower, and possession by the company. The heirs do not deny and make no claim.

The land is situated on Bradford avenue in the former village of Flushing, and on it and other land owned by the company is the railroad station built about the year 1870. The defendant company and companies in privity with it have had possession of the land from the time of the delivery to one of them of a deed dated April 1, 1868. Hence, such possession had existed for nearly forty years before the present action was begun. The land was at a time owned and possessed by one Coxe, whose brother and business agent was Bradford Prince, then a lawyer in Flushing. The lots were by her sold to one Master. Charlick, the president of the New York and Flushing Railroad Company (herein for convenient reference called the first company), employed Prince to purchase the land for the company, and for that purpose furnished him with money. Prince drew the deed executed by Master, but the name of the grantee was not inserted, and upon its execution and delivery by Master it was turned over to Charlick, and on the trial produced from the files of the Long Island Railroad Company or its predecessors, where presumably it had been since 1868.

But the deed, as produced, shows as grantee one Orange Judd, whose intimate relations with several railroad companies

Second Department, February, 1912.

[Vol. 149.]

here concerned will be later stated. Prince, as agent, received from the railroad company the principal and interest of the mortgage subject to which conveyance was made, satisfaction whereof was filed in 1873.

Prince, as a witness, has related this history and fortified it by careful memoranda made by him at the time, so that the transaction is revealed with unusual clearness.

On the trial there was received a certified copy of a warranty deed of the land from Judd to Herman C. Poppenhusen, dated May 1, 1869, acknowledged June 30, 1869, consideration one dollar. The grantee seems not to have retained possession of this deed, as it was not produced upon the trial, notwithstanding notice to the parties Poppenhusen to do so, and could not be found by the defendant company after most careful search, maybe on account of its destruction by the burning of one of the railroad buildings wherein similar documents were stored. That the railroad company retained it is suggested at least by a list of deeds and papers, including this one, kept by the counsel for the railroad company.

The relation of Judd and Poppenhusen to the railroads concerned indicates clearly the purpose of conveyance to the latter and his necessary understanding of his rights and duties. So far as pertinent, the New York and Flushing Railroad Company came first and the land was bought for it.

In April, 1868, the Flushing, North Side and Central Railroad Company (herein called the second company) was incorporated by Judd and others. Hinsdale, later Judge Hinsdale, who at one time was secretary of the first company, became the secretary, director and a member of the executive committee of the second company, and so remained until the Long Island Railroad Company succeeded, with which he held similar relations, and meanwhile was counsel for several of the companies. As a witness he was able to give the history of matters within his knowledge and identify pertinent resolutions of the company during his secretaryship, and to explain largely the relations of men, long since dead, to persons and events.

Before further discussion, attention is called to the fact that pursuant to an enabling act passed in April, 1869, and by a deed dated May 1, 1869, there was a certain consolidation of

App. Div.] Second Department, February, 1912.

the two companies whereby the second company acquired from the first a portion of its line, including the land in question. While this matter was pending, as well as a proposition to mortgage its road, the North Side, or second company, on April 26, 1869, passed a resolution: "That before the Flushing & North Side Railroad Company mortgage its road to secure its bonds, all of the lands not required to be used for railroad purposes shall be conveyed to Herman C. Poppenhusen, to be held in trust for the benefit of this railroad company, and that the president and secretary be authorized to execute to Herman C. Poppenhusen proper deeds of conveyance of such lands."

On June 30, 1869, the first company, in evident anticipation of the consolidation and action under the above resolution, passed a resolution: "*Resolved*, That in transferring the property to the said Flushing & North Side Railroad Company the president and secretary be authorized to convey the several lots of land of this company in Flushing to Herman C. Poppenhusen, as may be directed by the directors of the Flushing & North Side Railroad Company, who shall furnish order for the same."

It should be kept in mind that the deed to Poppenhusen, although dated May 1, 1869, which is after the resolution of April twenty-sixth, was not acknowledged until June thirtieth, the date of the last resolution. It will also be noticed that on the date of the resolution of April twenty-sixth Mr. Herman C. Poppenhusen was elected treasurer of the second company, to take effect on and after May first, and at the time of the resolution of June thirtieth the minutes show as present at the meeting of the first company, Orange Judd, C. Poppenhusen, Conrad Poppenhusen, Adolph Poppenhusen, H. C. Poppenhusen and Gooding.

In 1868 Judd was elected president of the second company. On June 26, 1868, the first company passed a resolution that the location of the depot should be changed to the north side of Bradford avenue, where the land in question is, and by authorization a map for that purpose was filed in the county clerk's office on June 29, 1868, but this was not done during the control of the first company, so that the land remained unused for railroad purposes.

Second Department, February, 1912.

[Vol. 149.]

The depot, as already stated, was moved to the site on Bradford avenue, and the new building erected about 1870, and in such position remained thenceforth during the entire relation of the Poppenhusen family to the railroad interests involved.

On August 11, 1868, of the first company Judd became a director, president and treasurer; Conrad Poppenhusen, Adolph Poppenhusen and others became directors, while Judd, Conrad Poppenhusen and Gooding became the executive committee, and on November 30, 1868, Herman C. Poppenhusen became a director.

On March 15, 1869, Conrad Poppenhusen became president and Hinsdale secretary and member of the executive committee of the second company, while Judd, a director, was made vice-president, and as stated Herman C. Poppenhusen became treasurer May 1, 1869, by election on April twenty-sixth. Herman C. Poppenhusen was a director of the second company as early as 1870, and as early as 1871 he is found a member of the executive committee, and continued his official relation until 1878 to that company or its successor, the Flushing, North Side and Central Railroad Company.

During this time Herman C. Poppenhusen was in active participation in the affairs of the company, sometimes acting as secretary of the meetings of the board, a director of the company, its treasurer, a member of the executive committee, reporting the financial condition and a statement of the property of the company, its assets and liabilities, and during his whole connection with the companies he was not heard by Mr. Hinsdale, with whom he was in intimate official relation, nor so far as appears by any person, to make any claim of interest in the land. Judge Hinsdale states that he knew of the deed made by Judd to Poppenhusen, and that he understood that the latter had received it for the railroad company and that he should have conveyed it back at the time, but that it was overlooked by somebody until his death, but that his memory of the matter is too dim for reliance thereon he seems to indicate.

On March 29, 1870, a resolution was passed by the second company authorizing a second mortgage, and Mr. Herman C. Poppenhusen was present at the meeting. The new depot building, begun probably in 1869 and covering in part the

App. Div.] Second Department, February, 1912.

land in question, was put up under the direction of Herman C. Poppenhusen and Judge Hinsdale, and paid for by the second railroad company, who carried out the plan for the new location inaugurated by the predecessor company.

So that it is clear that the Poppenhusen family, including the first Conrad and his sons, of whom Herman C. is one, were the controlling forces of the second company, and later, upon consolidation, formally ruled the first company.

When the deed was made by Judd to Poppenhusen in 1869, both men by their official relation to one or both knew of the contemplated acquisition by the second company. Herman C. Poppenhusen knew of the resolution passed by the first company because he was present at its passage. He must have known of the resolution of the second company, passed on April twenty-sixth, because he was then elected treasurer, and his own company was about to make a combination with it. He knew that he did not retain physical possession of the deed; that the land was in the possession of the company; that the building was put thereon at the expense of his company because he was one of two men to supervise it. He must have known that no rent was ever paid to him; that the taxes were paid by the railroad company. As a member of the executive committee he was an active participant in the entire management of the railroad and a principal actor in the acquisition and management of its real property.

Hence the directors of the first company on June 30, 1869, by the participation of Herman C. Poppenhusen, authorized such conveyance to him of such land as the directors of the second company should direct, the second company on April 26, 1869, having resolved that its president and secretary should convey to Herman C. Poppenhusen in trust for it all land not required to be used for railroad purposes. Thereupon a deed, dated May 1, 1869, at which date Herman C. Poppenhusen became treasurer of the second company, and acknowledged June thirtieth, the date of the resolution of the first company, was executed by Judd, then a director or officer of both companies, to Herman C. Poppenhusen, then a director or officer of both companies. As the deed delivered by Master to the first company was in blank as to the grantee, it was only necessary for

Judd's name to be inserted and then as apparent owner convey it. The trust is declared by the resolutions, and while Herman C. Poppenhusen did not personally declare it, he was a participant in its declaration and is bound by it. Indeed, it is due to his memory to state that he never betrayed it. As the trust was passive, the title so declared vested in the first company, and the second company succeeded to it by the consolidation deed of May 1, 1869. (*Bates v. Ledgerwood Mfg. Co.*, 130 N. Y. 200, 205.)

But certain things remain to be considered: (1) Whether the court should have directed the heirs at law to convey; (2) whether, as against the plaintiff, there was error in the reception of evidence.

The railroad company may not complain. Its position is that the trust was passive. If so, the title vested in it at once, and it has it, but if there is a cloud on its title it is by its own act. It has waited since 1869 and only takes advantage of the presence of the parties in court to ask for relief. But the heirs at law did not bring it in court, and when there made no claim to the land. It is sufficient that the judgment is its protection.

The plaintiff appellant says that the railroad company has not gained title by adverse possession as against the plaintiff's right of dower. It is not necessary to discuss that question. The plaintiff may take either one of two positions. The land belonging to the railroad company was conveyed to her husband without any authority whatever, or it was conveyed in trust pursuant to the resolutions of April twenty-sixth and June thirtieth. The first position indicates a fraud, something no better than tortious seizure by its officer of the property of the corporation. The second position gives the conveyance the character of one for a trust purpose not recognized by the statute, hence a passive trust whereby the title vested in the corporation.

But it is objected to that there was error in the admission of evidence whereby the facts were established. Without discussing every alleged error in this regard, although they have been considered, I come to the evidence of the minute books and resolutions of the railroad companies. The appellant seems to suggest that as H. C. Poppenhusen was not present,

App. Div.] Second Department, February, 1912.

the acts of the companies do not affect him. But he was present in some cases and participated; he acted upon them, as it may be inferred.

The book of the New York and Flushing Railroad Company was properly employed. Judge Hinsdale was, at times, related to it as secretary, director and counsel, and identified several signatures of persons dead or whose whereabouts are unknown. Judge Hinsdale did read of the election and resignation of officers as shown by the book, and of this he had not independent knowledge, but the error, if any, is unimportant, as he testified: "I know the men took charge and had business relations with them afterwards," and he adds: "All I intended to swear to was that I read, as I understand it, what I found here (indicating book) and that that was supplemented by the fact that I knew they were officers and acted as such after that time." Then follows a statement of his knowledge. But the most important item of evidence is that of the resolutions. There is no objection to the method of identification of the resolutions of April twenty-sixth and June thirtieth. If the identification be sufficient, certainly a resolution passed by H. C. Poppenhusen's participation is competent, irrespective of its probative effect. This resolution, it could be inferred, has and was intended to have relation to the resolution of the first company passed on April twenty-sixth, and considering the testimony which has been sketched above, there can be no doubt of such relation of Herman C. Poppenhusen to these resolutions as to make them competent and relevant to the deed taken by him. If their authenticity be known, their application appears. Prince was employed by Charlick, then the president of the first company, to buy the land in question from Master, and by permission and under the plaintiff's objection, Prince did testify to the authority given him by Charlick and of his actions pursuant thereto. Herman C. Poppenhusen was not present, but the evidence was none the less admissible. How was the deed procured, who procured it, for what reason was the name of the grantee omitted? This was a history that the railroad company was entitled to give, and the conversations were part of the *res gestæ*. It was from this transaction that the title of Herman C. Poppenhusen arose. But

Second Department, February, 1912.

[Vol. 149.]

even if the conversations with Charlick were objectionable, it would still appear that the land was bought at Charlick's instance with the money of the railroad company and that the deed was delivered to the railroad company with the name of the grantee omitted.

The judgment should be affirmed, with costs in favor of the railroad company against the plaintiff, and with costs to defendants Poppenhusen against the railroad company.

JENKS, P. J., HIRSCHBERG and CARR, JJ., concurred; BURR, J., not voting.

Judgment and order affirmed, with costs in favor of the railroad company against the plaintiff, and with costs to defendants Poppenhusen against the railroad company.

ROBERT L. SEARCY, Respondent, *v.* CASUALTY COMPANY OF AMERICA, Appellant.

Second Department, February 16, 1912.

Principal and agent — insurance — cancellation of contract with general agent — action for breach — defense.

Where an insurance company cancels a five-year contract with its general agent within a certain territory and notifies the agent to discontinue business therein and cancel all outstanding policies, it is no defense to an action for breach of contract that an assignment of the agent's claim for damages to the plaintiff was itself a breach of the contract of agency.

APPEAL by the defendant, the Casualty Company of America, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 5th day of April, 1911, upon the verdict of a jury.

Theodore A. Lord [Lyman A. Spalding with him on the brief], for the appellant.

Isaac R. Oeland [H. E. J. MacDermott with him on the brief], for the respondent.

THOMAS, J.:

In November, 1903, the defendant made a contract with the Underwriters Real Estate and Rental Company in the State

of Alabama, whereby the latter became the "General Agents of the Company" for the State of Alabama for the term of five years from November 18, 1903.

On December 15, 1903, the defendant indefinitely suspended its business in that State and so advised the Underwriters Company by a letter of which the following is a copy:

"**GENTLEMEN.**—The attention of the Company having been called to the unfavorable conditions existing in the Southern States at present for Casualty business, and to the laws that are being enacted, which make it improbable that any Casualty Company can profitably carry the business in future, the Executive Committee of the Company has determined to suspend all business in your territory until a more favorable condition develops.

"We regret, therefore, to be obliged to request that on and after receipt of this you do not write or bind any business for this Company. We realize that this may cause you considerable inconvenience and perhaps some loss, which we certainly would spare you if possible, but in view of the existing facts, there is no alternative.

"Kindly acknowledge receipt of this and be guided strictly accordingly and oblige."

This letter was later supplemented by the following letter:

"**GENTLEMEN:**

"Re business.

"Referring to our letter of yesterday, notifying you that the Company had decided to discontinue business in your territory, please cancel all outstanding business on receipt of this, at the shortest possible notice, so that the Company may be delivered of liability immediately."

Here was a final and complete severance of all relations by the defendant with the Underwriters Company and a cancellation of its agreement without any anticipation of a resumption of the relations.

On June 21, 1905, the Underwriters Company assigned to the plaintiff "all its right, title and interest in and to the aforesaid contract and in and to any claim, demand or cause of action whatsoever that it now has or may hereafter have

against the said Casualty Company of America for damages growing out of or caused by its breach of said contract."

The plaintiff has recovered some \$10,000 damages. The appellant on this appeal waives all exceptions except those relating to the award of damages for the full term of the contract subsequent to its breach.

It seems to be the appellant's argument that the contract was for the personal services of the Underwriters Company and that it was the duty of such company to hold itself in readiness for the remainder of the term to perform the service to which it had bounden itself under the contract and which the defendant company had in 1903 once for all precluded it from ever doing and that by its assignment of the contract to the plaintiff it could no further act under the contract and perform the services as originally intended.

The fact and the law are that the defendant once for all informed the Underwriters Company that its services were no longer desired and would not be accepted at any time during the term of the contract, and that thereupon a cause of action inured to the Underwriters Company to recover the value of the contract. The contract in this cause of action it assigned to the plaintiff, so that what the Underwriters Company had the plaintiff has. It will be noted that the appellant asserts that by this assignment the Underwriters Company was guilty of a breach of the contract itself, because it thereby put itself in a position where it could not render the personal service.

But the vice of that argument is that the defendant had put itself in a position where it refused at any time to let the Underwriters Company perform the service and so informed it. Hence, the Underwriters Company was not bound to hold itself in readiness.

The defendant cannot, after having broken the contract beyond the power of restoration, accuse the other party of breaking it because it has adapted itself to the situation which the defendant has created by its wrong.

The judgment should be affirmed, with costs.

JENKS, P. J., CARR, WOODWARD and RICH, JJ., concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. TOWN OF SCARSDALE, Relator, *v.* THE BOARD OF SUPERVISORS OF WESTCHESTER COUNTY, Respondent.

Second Department, February 28, 1912.

County — public officer — power of board of supervisors — fixing boundary between town and city — power of board to act — legislative function.

The resolution of a board of supervisors, classified in the Constitution as a legislative body, fixing the location of a disputed boundary line between a town and a city within the county, passed by a majority vote of all the members, is a legislative act not subject to judicial review.

The fact that the board upon the hearing of the application of which notice had been given as required by the statute took the sworn testimony of witnesses did not deprive it of its power to act without evidence, the statute not requiring it to be taken.

An act does not become judicial simply because it involves discretion, hearing and determination, and when something like a judicial hearing is adopted by a body not obligated to such course, its power to act is not thereby changed in its nature.

CERTIORARI issued out of the Supreme Court and attested on the 22d day of April, 1910, directed to the board of supervisors of Westchester county, commanding said board to certify and return to the office of the clerk of the county of Westchester all and singular its proceedings had in establishing and defining the boundary between the town of Scarsdale and the city of New Rochelle.

Albert Ritchie [William Cravath White and Charles H. Young with him on the brief], for the relator.

Charles A. Van Auken, for the respondent.

THOMAS, J.:

This proceeding to review the determination by the board of supervisors of Westchester county of the disputed boundary line between the relator and the city of New Rochelle presents the preliminary inquiry whether its act was legislative precluding this appeal or judicial permitting it. If it was judicial there would follow the questions whether the board did "establish and define" a line within the meaning of section 36 (now sec-

tion 37) of the County Law, and whether it did "establish and define" the line in accordance with the facts shown in the record. It is considered that the answer to the first inquiry disposes of the appeal.

Although boards of supervisors exercise in instances judicial powers, they are primarily legislative bodies, recognized and classified as such by the Constitution. While supervisors pre-existed the first Constitution of the State where they are mentioned (Const. of 1777, § 29), and while they were empowered by the Constitution of 1821 to participate in the appointment of justices of the peace (Art. 4, § 7), yet it was not until the Constitution of 1846 that the governmental nature of boards of supervisors was indicated, which was done by classifying them as legislative bodies, and it is directed that they make certain divisions for the purposes of Assembly districts (Art. 3, § 5), and it is provided that "The Legislature may confer upon the boards of supervisors of the several counties of the State such further powers of local legislation and administration as they shall from time to time prescribe" (Art. 3, § 17), and also may confer on them the appointment of county officers (Art. 10, § 2). This elemental legislative characteristic was determined by the adoption in 1874 of amendments to the Constitution as follows:

"§ 22. There shall be in the several counties, except in cities whose boundaries are the same as those of the county, a board of supervisors, to be composed of such members, and elected in such manner, and for such period, as is or may be provided by law. In any such city the duties and powers of a board of supervisors may be devolved upon the common council or board of aldermen thereof.

"§ 23. The Legislature shall, by general laws, confer upon the boards of supervisors of the several counties of the State such further powers of local legislation and administration as the Legislature may from time to time deem expedient.

"§ 24. The Legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant an extra compensation to any public officer, servant, agent or contractor."

These sections correspond generally to the present Constitution (Art. 3, §§ 26-28). It may be noticed that by present section 26

the bodies upon whom the duties of boards of supervisors may be devolved are legislative and are so described. It was to such bodies, endowed with primal legislative nature by the Constitution, that the statute granted certain powers, which it then and there declared to be legislative, by enacting chapter 194 of the Laws of 1849, entitled "An Act to vest in the board of supervisors certain legislative powers, and to prescribe their fees for certain services." The act makes a first provision for the alteration of the bounds of a town or the erection of a town, and points out the procedure which involves application, notice thereof, and publication of favorable action with the laws of the Legislature. The duty so delegated was essentially legislative and was such as the Legislature was wont to exercise, viz., the subdivision of counties. And it will be remarked that the further acts by that statute authorized are such as a legislative body would do, and such as an executive or judicial officer, or a court would not do.

In 1870 the statute was amended by chapter 361, entitled "An Act to amend an act entitled 'An act to vest in the board of supervisors certain legislative powers, and to prescribe their fees for certain services,' passed April third, eighteen hundred and forty-nine," and thereby an additional subdivision was added to section 4 of the original act in part as follows: "15. To fix, establish, locate, and define disputed boundary lines between the several towns in their respective counties, by a resolution to be duly passed by a majority of all the members elected to such board."

The procedure is, in its trend, similar to that in the statute provided for the alteration of the bounds of a town and the erection of a town, and indicates a legislative act done in a way prescribed. When, therefore, there is found a duty falling within those of the legislative branch of the State, for certainly it does not belong to the executive or judicial department, delegated to a board of supervisors, recognized and classified in the Constitution as a legislative body, and granted by a statute which declares that it is a legislative power, a judicial nature can be ascribed to the duty only upon clear and convincing evidence, even if it may be done at all. While it does not directly

affect the present inquiry, it may be noticed that by chapter 559 of the Laws of 1910 the Legislature did fix the line as the board of supervisors defined it. But it illustrates that the act and power were legislative in nature. But it is urged that the board was empowered to find the true line by evidence, and that the line determined must be adjusted to the proof. Wherefore, as urged, the act is bereft of a legislative complexion and given the color of judicial finding. The statute does not require evidence to be taken, but it does require notice of application to be given. The board may then, should then, hear, and upon such hearing it may fix the line. Thereupon there would be no record to be brought to this court. But the board preferred to hear, not through persons appearing alone, but through those that should speak to it under oath and advise them of their knowledge. The board did not thereby deprive itself of its power to act without the evidence, nor thereby does its power become subject to judicial review.

In determining whether the power was legislative or judicial, we do not consider whether the board acted wisely, providently, or as men would who wished to be best informed and to be influenced by whatever they learned, but whether its power was so judicial in its quality as to require action conformable to judicial procedure, and so subject to review. An act does not become judicial simply because it involves discretion, hearing and determination, and when something like a judicial hearing is adopted by a body not obligated to such course the power is not thereby changed in its nature. The boundary between the two towns is in dispute; upon application and certain notice the board by "resolution" fixes, establishes, locates and defines the line in dispute, and the resolution with map is filed and the resolution published with the laws of the next Legislature. What heed of facts it shall take, whom it shall consider, how thoroughly it shall inquire, these are matters of personal conscience and official duty, but not of judicial supervision. The evidence in this case illustrates the wisdom of confiding the question to the aggregate knowledge and judgment of the supervisors of the county, to officials with opportunities to have learned or to learn what may be known or understood by the inhabitants of the locality, and to act thereon without the nice

App. Div.]Fourth Department, March, 1912.

rules of evidence and accurate conclusions therefrom that are expected to obtain in methodical trials by judicial officers.

There is here involved a zone of land some 400 feet wide between the towns, and whether the ancient line is to the east or west of such zone the taxpayers therein, some, or all, dispute. Inquiry discloses the claims of the parties, and the facts established or claimed to be established whereon the claims depend. But the ascertainment of the truth is baffled by a confused mass of narratives of men and events, some things appearing distinctly, some doubtfully, some dimmed beyond usefulness by the faded recollections of the narrators, while actual, dependable but necessary knowledge has been lost by the death of those who had it. It was to fix a line so disputed that the board of supervisors set itself, pursuant to the power, to solve it as a legislative body would do it, untrammeled by aught save a conscientious use of material and opportunity.

The writ of certiorari should be dismissed, with costs and disbursements to respondent.

JENKS, P. J., HIRSCHBERG, BURR and CARR, JJ., concurred.

Writ of certiorari dismissed, with costs and disbursements to respondent.

ELVIRA E. MUCK, Appellant, v. S. EDWARD HITCHCOCK and Others, Respondents, Impleaded with THE AMERICAN MILLENNIAL ASSOCIATION, Defendant.

Fourth Department, March 6, 1912.

Corporation — religious corporation — contract to convey land — leave of court — specific performance — damages — deposit on contract — equitable lien — sale to other persons — appeal — judgment.

At common law a religious corporation could not sell its real property without leave of court.

Although under our statute (Religious Corporations Law, § 12) a religious corporation cannot sell its real property without leave of court, and although by section 21 of the General Corporation Law a foreign corporation can convey real property in the State only in the same manner as a domestic corporation, it is error to hold as a matter of law that a foreign religious corporation owning real estate here cannot enter into a

Fourth Department, March, 1912.

[Vol. 149.]

valid contract of sale without leave of the court, where no evidence is given of the law of the foreign State on this point.

A religious corporation may enter into a contract for the sale of its real estate with the condition that the conveyance is to be made if permission of the court can be obtained. Even if such condition is not expressed in the contract the court will imply it.

A court of equity in a suit for the specific performance of such contract has power to inquire into its fairness, to approve the proposed conveyance and direct it to be made, if no valid reason appears for refusing such relief.

Where, however, the sale at the price contracted for would be disadvantageous to the corporation, it will be relieved from the contract upon placing the vendee in *statu quo*.

Where the corporation has refused to carry out the contract and has wrongfully refused to return to the vendee her payment thereon and where specific performance cannot be decreed and it appears that the proposed transfer would be disadvantageous to the corporation, the vendee will be adjudged to have an equitable lien on the premises for the amount paid by her and to be entitled to enforce such lien by a sale of the property, if the facts warrant. This, although the corporation had sold the property to other parties.

Respondents who subsequently purchased the premises from the corporation with full knowledge of the prior contract and rights occupy no better position than does the corporation itself.

Where on appeal in an equity suit the facts are not in dispute, the court has power to direct such judgment as the parties are equitably entitled to.

KRUSE and SPRING, JJ., dissented, with memorandum.

APPEAL by the plaintiff, Elvira E. Muck, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Livingston on the 24th day of April, 1911, upon the decision of the court rendered after a trial at the Monroe Special Term dismissing the complaint upon the merits.

The action was commenced on the 12th day of July, 1909, to obtain specific performance of a contract for the sale of a parcel of real property situate in the county of Livingston, entered into between the defendant corporation and the plaintiff, it being alleged that the defendant after the making of the contract deeded the property to the other defendants and refused to carry out its contract with the plaintiff. The plaintiff asked that the defendants be directed to convey the premises to the plaintiff, or if such relief could not be had,

App. Div.]

Fourth Department, March, 1912.

that the said corporation be compelled to respond in damages for the breach of the contract. The summons was served by publication upon the defendant corporation and by personal service without the State upon one of its officers. The corporation did not appear or answer in the action. The other defendants answered and set up the defense, in substance, that the plaintiff's contract was fraudulently obtained from the said corporation and should be canceled; that the plaintiff abandoned the contract, and that thereafter the premises were sold to such defendants.

Milton E. Gibbs, for the appellant.

Albert C. Olp and J. Hunter Black, for the respondents.

MCLENNAN, P. J.:

On this appeal the appellant presents none of the evidence taken before the court, but simply the judgment roll in the action. The court made certain findings of fact, from which it appears that the defendant American Millennial Association is a foreign religious corporation, organized under the laws of Massachusetts, and had, at some time prior to the commencement of this action, acquired by devise the premises in question, a farm located in Livingston county, N. Y. Thereafter and on February 21, 1908, the plaintiff entered into a written contract with the corporation whereby it agreed to sell the farm to the plaintiff for the sum of \$600, \$50 of which was paid on signing the contract. The balance was to be paid and the deed delivered on July 1, 1908. The plaintiff notified the defendant before that date that she was ready to fulfill her contract upon delivery of the deed to her. The corporation replied, suggesting that plaintiff prepare the deed. This was not done, however, until about December 1, 1908, when a tender of the balance due was made at the office of the corporation in Boston, but the corporation refused to accept the same or to sign any deed, and also refused to return the \$50 which the plaintiff had paid on account of the contract. On or about January 29, 1909, the defendant corporation entered into a contract with the defendant Welch to sell the farm to him for \$1,400. Thereafter the corporation took proceedings in the Liv-

Fourth Department, March, 1912.

[Vol. 149.]

ingston County Court, and obtained an order authorizing it to sell the farm to Welch for \$1,400, and a deed was executed and delivered accordingly to the defendant Hitchcock, the assignee of Welch. So far as appears the plaintiff was not a party to and had no notice of such proceedings. No proceedings were ever taken to obtain leave of the court permitting the defendant to sell the farm to the plaintiff in pursuance of the contract entered into or otherwise. It is alleged that the plaintiff's contract was filed in the Livingston county clerk's office in August, 1908, and the court has found that the defendants Hitchcock and Welch knew of the contract which the defendant corporation had made with the plaintiff before they purchased the farm. Upon these facts the court has found that the contract entered into between the said association and the plaintiff for the sale of said farm cannot be enforced in this action because no permission of the court had been ever obtained for the making of said contract or the sale of the lands to the plaintiff, and that the defendants are entitled to a judgment dismissing the complaint, without costs.

Section 12 of the Religious Corporations Law of the State of New York provides: "A religious corporation shall not sell or mortgage any of its real property without applying for and obtaining leave of the court therefor pursuant to the provisions of the Code of Civil Procedure." (Consol. Laws, chap. 51 [Laws of 1909, chap. 53], § 12, which re-enacted Gen. Laws, chap. 42 [Laws of 1895, chap. 723], § 11, as amd. by Laws of 1902, chap. 208, and Laws of 1908, chap. 363.) Section 21 of the General Corporation Law of this State provides: "Any foreign corporation may purchase at a sale upon the foreclosure of any mortgage held by it, or, upon any judgment or decree for debts due it, or, upon any settlement to secure such debts, any real property within this State covered by or subject to such mortgage, judgment, decree or settlement, and may take by devise any real property situated within this State and hold the same for not exceeding five years from the date of such purchase, or from the time when the right to the possession thereof vests in such devisee, and convey it by deed or otherwise in the same manner as a domestic corporation." (Consol. Laws, chap. 23 [Laws of 1909, chap. 28], § 21, which re-enacted Gen. Laws,

App. Div.] Fourth Department, March, 1912.

chap. 35 [Laws of 1892, chap. 687], § 18, as amd. by Laws of 1894, chap. 136.)

The trial court has held that under these provisions a foreign religious corporation must convey its real property in this State in the same manner as a domestic religious corporation, and that such foreign corporation cannot make a valid contract for the sale of its real property within this State without first obtaining permission of the court. It might be interesting to determine whether a foreign religious corporation can make a valid conveyance under such circumstances without first obtaining leave of court, and we are not prepared to say that section 21 of the General Corporation Law above quoted has the effect of bringing a foreign religious corporation within the provisions of section 12 of the Religious Corporations Law. It is plain that the provisions of section 21 of the General Corporation Law afford to foreign corporations, religious or otherwise, certain privileges in the way of taking, holding and conveying real property in this State. It may be that, as urged by the appellant, such provisions are merely permissive in their effect, and are intended simply to allow foreign corporations to come into our State and take, hold and convey real property in any manner authorized by their charters under the laws of the State where organized, and that any specific restriction on our own corporations does not apply to a foreign corporation, unless it can be said that such specific provision represents the public policy of our State in relation to all corporations, foreign or domestic. And there may be some force in the suggestion that the restriction in question here does not represent any public policy in that regard, for the reason that no statutory restriction upon the alienation of real property is placed upon religious associations generally, but only upon incorporated religious bodies. And the appellant contends that if this be so, the laws of Massachusetts would govern, in connection with the provisions of the defendant corporation's charter, and that, in the absence of proof as to such laws or provisions, the presumption would prevail that the common law governs the matter in Massachusetts, and that it does not prevent a religious corporation from transferring its property in the same manner as any other kind of corporation.

In our opinion, however, the determination of this question in favor of the appellant would not aid her on this appeal. There is no evidence before us as to what the statutes of Massachusetts provide in such a case, nor are we informed by the record what powers are given to, or what restrictions are placed upon, the defendant corporation in its charter. And if the presumption is to obtain that the common law prevails on this subject in Massachusetts, the appellant still receives no aid from that fact, for our courts have held that the common law forbids a religious corporation from selling its property without first obtaining leave of court. (*Madison Avenue Baptist Church v. Baptist Church in Oliver St.*, 46 N. Y. 131, 141.) So that upon the record before us it is apparent that in either event the defendant corporation, in order to make a valid conveyance of the real property in question, must first have obtained leave of court; and it is immaterial to determine whether such leave was necessary in pursuance of any mandate of our statutes or in obedience to the common law. If the record contained any evidence or finding as to what the statutes of Massachusetts provide in such case, or as to what powers are given or restrictions imposed in the defendant corporation's charter, we might be called upon to consider the proposition urged by the appellant as to the effect of the provisions of our statutes.

We are, however, of the opinion that the trial court erred in holding as matter of law that a religious corporation cannot enter into a valid contract of sale without permission of the court. Concededly, under our statutes, a domestic religious corporation cannot make a valid conveyance of its real property without such leave. But it seems logical and reasonable that a religious corporation may enter into a contract for the sale of its real property with the condition that conveyance be made upon permission of the court, if such can be obtained, and that even if such condition be not expressed, the court would imply such a provision in the contract. And we do not doubt that a court of equity in an action to compel specific performance of such a contract has ample power to inquire into the fairness of the contract and as to its advantage or disadvantage to the religious corporation, and to approve the proposed conveyance and direct it to be made where, upon all the facts, no valid

App. Div.]

Fourth Department, March, 1912.

reason appears for refusing such relief. (*Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Pr. [N. S.] 484.) It is apparent, however, from the record in this case that a court of equity should not compel specific performance of the contract by the defendant corporation, for the reason that at the price contracted for the sale would be to the disadvantage of the corporation, and the defendant corporation is entitled to be relieved from the contract upon placing the plaintiff in *status quo*. This the corporation has not done, and the plaintiff is entitled to be protected under her contract against any inequitable act on the part of the defendants in the premises. The corporation could only be relieved from its contract upon returning to the plaintiff the amount paid by her on the contract, and where, as in this case, the corporation has wrongfully refused to do that and specific performance cannot be decreed, the plaintiff will be held to have an equitable lien on the premises for the amount so paid and is entitled to enforce such lien by sale of the property if the facts warrant. (*Price v. Palmer*, 23 Hun, 504.) In our opinion the facts shown warrant the granting of this relief to the plaintiff. The defendant corporation, so far as appears, has no office for the transaction of business within this State, and the plaintiff is without recourse against it in the courts of this State to recover back the sum so paid, except in this manner in this action. The defendants who purchased the premises knew of plaintiff's contract and rights and cannot be said to occupy any better position than does the corporation itself in that respect. The facts are not in dispute, and this court has power to direct such judgment in the premises as the parties are equitably entitled to. (Code Civ. Proc. § 993.)

The defendants are entitled to judgment directing that the plaintiff's contract be canceled of record upon condition that plaintiff recover back the sum of fifty dollars paid on such contract, with interest thereon from February 21, 1908, together with the costs of this appeal, and the plaintiff is entitled to judgment declaring such recovery to be a lien upon the premises contracted to be sold to her, and that if the same be not paid within thirty days after the service of a copy of the judgment hereby directed on the defendants S. Edward Hitchcock,

Alice Hitchcock and William J. Welch, the premises in question or so much of the same as may be necessary be sold by a referee to be appointed by the court upon application and that the plaintiff be paid from the avails of such sale.

The judgment appealed from should be reversed and vacated and a judgment entered as above outlined.

All concurred; KRUSE and SPRING, JJ., voting for reversal in a separate memorandum by KRUSE, J.

KRUSE, J. (memorandum for reversal):

I agree to the reversal, but think there should be judgment in favor of the plaintiff requiring the defendant to carry out its contract and convey the premises. I think real property acquired and held by a foreign corporation, such as this, may be conveyed without obtaining leave of the courts of this State, and that the contract is enforceable.

SPRING, J., concurred.

Judgment reversed and vacated, and judgment directed to be entered in accordance with the opinion of McLENNAN, P. J., with costs to appellant.

EURETTA EARNEST, Appellant, *v.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.

Fourth Department, March 6, 1912.

Carrier — interstate commerce — Carmack amendment — liability of initial carrier for loss — connecting carrier — uniform bill of lading — inspection of property — refusal of consignee to accept goods — conversion.

Before the passage of the Carmack amendment to the Hepburn Act, unless an initial carrier by contract agreed otherwise, its liability for goods received for transportation ceased upon safe delivery to the first connecting carrier.

The effect of the Carmack amendment as to interstate shipments was to make connecting carriers the agents of the initial carrier the same as if it had contracted for through carriage to the point of destination, and to render the initial carrier liable for all loss, damage or injury to the property while *en route*.

App. Div.] Fourth Department, March, 1912.

Where the rights of a shipper and carrier are not regulated by agreement, the consignee has a right to inspect the goods before accepting them.

The use of the uniform bill of lading is not obligatory upon either shipper or carrier, but if it is adopted as the agreement of the parties and loss or damage occurs by reason of a breach by a connecting carrier, the initial carrier is liable.

The Carmack amendment does not make an initial carrier liable for conversion because a connecting carrier, which has the custody of the goods, permits them to be inspected by the consignee or any one else.

Where, however, a shipper and carrier use the uniform bill of lading, which provides that inspection of the property covered thereby will not be permitted by the carrier unless provided by law or unless permission is given in writing by the shipper, the initial carrier is liable for damage caused to the property by an inspection permitted by a connecting carrier in violation of the terms of the bill of lading.

Where apples were shipped under a uniform bill of lading and no permission for an inspection was given by the shipper, the initial carrier is not liable in conversion because a connecting carrier permitted the consignee to inspect them, if it is shown that the apples were not in any way injured by the inspection.

This is so, although the consignee after the inspection refused to accept the apples which had been sold under an oral contract insufficient under the Statute of Frauds.

Without regard to the Carmack amendment or the uniform bill of lading, conversion does not lie for an unauthorized inspection of goods at the point of destination.

It seems, that if property is sold by the carrier without authority so that it asserts title in hostility to the claim of the shipper an action for conversion lies.

APPEAL by the plaintiff, Euretta Earnest, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Steuben on the 10th day of December, 1910, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case on a trial at the Steuben Trial Term.

Monroe Wheeler, for the appellant.

Halsey Sayles, for the respondent.

SPRING, J.:

On the 2d day of November, 1908, the plaintiff delivered to the defendant, a common carrier, at its station in Bath, N. Y., 240

Fourth Department, March, 1912.

[Vol. 149.]

barrels of apples, consigned to the order of the First National Bank of Wayland, N. Y., and destined for Chicago, Ill. The contract or bill of lading made by the defendant was delivered to the plaintiff and the same was attached by the latter to a sight draft upon Train, Letterman & Ford, of Chicago, Ill., for \$660, payable to the order of the said First National Bank of Wayland, N. Y.; and this draft was, with the bill of lading, sent through the bank for collection. An oral contract for the purchase of said apples had been made prior to their delivery to the defendant by an agent of Train, Letterman & Ford, whereby he agreed on behalf of said company to purchase said apples at \$2.75 per barrel. No payment or written memorandum was made of such purchase.

The bill of lading provided: "Inspection of property covered by this bill of lading will not be permitted unless provided by law, or unless permission is indorsed on this original bill of lading or given in writing by the shipper. * * * The carrier or party in possession of any of the property herein described shall be liable for any loss thereof, or damage thereto except as hereinafter provided."

The contract further provided that the defendant should not be liable for loss, damage or injury not occurring on its own road, "except as such liability is or may be imposed by law."

Before the apples were shipped a few barrels of them were inspected by the agent of the Chicago firm. They arrived in Chicago on the sixth of November, and the yard agent of the railroad company erroneously entered the shipment as if there were no restrictions as to inspection in the bill of lading. The firm of Train, Letterman & Ford was notified by the defendant of the arrival of the apples in compliance with the direction contained in the bill of lading. It sent two employees to the freight yard of the defendant and the yardmaster unsealed the car, and these employees, with his permission, inspected about sixteen barrels of these apples, and thereafter resealed the car. The Chicago company refused to receive the apples and the plaintiff commenced this action of trover against the defendant. There is no proof that the apples were damaged, or that there was any loss or injury to the plaintiff.

App. Div.] Fourth Department, March, 1912.

by reason of the inspection made by Train, Letterman & Ford in violation of the agreement set forth in the bill of lading.

The plaintiff founds her right to recover upon a clause in an act of Congress regulating commerce between the States, and which is designated as the Carmack amendment to the Hepburn Act, being an amendment to the Interstate Commerce Act (approved February 4, 1887, in effect sixty days thereafter), and which Hepburn Act as thus amended is chapter 3591 of the first session of the fifty-ninth Congress, and became a law sixty days after June 29, 1906, the date of its approval. Section 20 of the original act was amended by section 7 of the amendatory enactment, and, among the provisions added by the amendment, is the following: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." (See 24 U. S. Stat. at Large, 386, § 20, as amd. by 34 id. 593, 595, § 7; 34 id. 838, Res. No. 47.)

There is an added clause entitling the common carrier, railroad or transportation company issuing the bill of lading to recover of the carrying company "on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property." (Id.)

Irrespective of this amendment, the initial carrier might by contract make itself liable for the delivery of property accepted by it for transportation to the point of destination wherever in transit the loss might occur. Unless it did so extend its liability its obligation to the shipper terminated upon the safe delivery of the goods to the first connecting carrier on the

route. (*Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 196 *et seq.*)

The effect of the Carmack amendment as to interstate shipments is to make the connecting carriers the agents of the initial carrier, the same as if it had contracted for through carriage to the point of destination. (S. C., 196. See, also, p. 200 *et seq.*)

This act made a radical change in the obligation imposed upon the first carrier, and Congress defined the extent of the liability which it incurred for loss of property received by it and lost in transit beyond its own line. The section provides that the carrier accepting the property for interstate shipment "shall be liable * * * for any *loss, damage, or injury* to such property" *en route*.

The act itself did not provide for any specific bill of lading or shipping contract. Representatives of the common carriers and transportation companies and of the shippers, after many conferences, agreed on a formal bill of lading to make effective in equity to all parties the amendment adverted to, and this uniform bill of lading, so called, was on June 22, 1908, approved by the Interstate Commerce Commission. (*Matter of Bills of Lading*, 14 I. C. C. Rep. 346.)

The bill of lading so approved contained this provision: "Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper."

The Carmack Act contained no provision prohibiting the inspection of property at the point of destination. Where the right of the shipper and carrier are not regulated by agreement, the right of the consignee to inspect exists. (Hutch. Carriers [3d ed.], § 733; *Brand v. Weir*, 27 Misc. Rep. 212, 214.)

And there was no inhibition of that rule by the act of Congress. The matter was adjusted by agreement, and the parties to this action in the bill of lading, we may assume, were endeavoring to comply with the agreement of the shippers and carriers and approved by the Interstate Commerce Commission, and in furtherance of the provisions of the Carmack amendment quoted. The use of this bill of lading is not obligatory

App. Div.] Fourth Department, March, 1912.

upon either shipper or carrier. If it is adopted as the agreement of the parties and loss or damage occurs by reason of a breach of any of the provisions contained in it through the fault of a connecting carrier, the initial carrier must stand the loss. The bill of lading did not extend the liability beyond the scope of the Carmack amendment. An initial carrier is not made liable for conversion because a company having the custody of the property permits it to be looked at either by the consignee or any one else. If an examination of the property in violation of the agreement between the parties causes damage to it, then the first acceptor may be made to pay for that damage.

In the present case the evidence undisputedly establishes that the carrier at the point of destination permitted an inspection of the apples, and hence the defendant, in pursuance of the Carmack Act, must respond for whatever loss resulted to the plaintiff by the breaking of the agreement. The extent of the loss or injury the plaintiff must prove. There is no claim that the apples were injured by the inspection, or that the refusal of the Chicago firm to accept the apples, which they were not legally bound to purchase, was by reason of this inspection. There is not the slightest proof of any loss or damage or injury to the fruit. On the contrary, the proof shows that they were not injured at all by the inspection. The railroad company retained the actual possession of the property. Its dominion over it was not surrendered, and the plaintiff was promptly notified by Train, Letterman & Ford that they did not wish the apples, and plaintiff refused to receive them from the railroad company. It knew possession of the apples was not to be given to the Chicago firm until it had honored the draft upon it. The railroad company did violate its agreement, and the measure of its liability for that breach was the loss or injury to the apples.

Without regard to the Carmack amendment, and the approval of the uniform bill of lading, the courts have held that conversion did not lie for an unauthorized inspection of goods at the point of destination. (*Dudley v. Chicago, M. & St. P. R. R. Co.*, 58 W. Va. 604; *Sloan v. Carolina Central R. R. Co.*, 36 S. E. Rep. 21; *Yuille-Miller Co. v. Chicago, I. & L.*

Ry. Co., 128 N. W. Rep. 1099. See, also, *Wamsley v. Atlas Steamship Co.*, 168 N. Y. 533.)

In the case first cited apples were inspected at the point of destination. They were in barrels, consigned to the shipper, and were taken from the car and placed on the wagon of one Sharp, who was notified of their arrival in compliance with the directions of the plaintiff shipper. After they were inspected by an agent of Sharp, they were replaced in the car from which they had been removed, and Sharp refused to accept the apples. Sharp did not produce the bills of lading, or show any right to the possession of them. The railroad company permitting the inspection was sued in conversion, and the Court of Appeals of West Virginia held that conversion would not lie. The court, in commenting on the inspection and the effect of it, used this language (at p. 607): "Sharp's agent was simply permitted to enter the cars, set barrels out in his wagon, open them, and examine the apples. Then they were put back in the car and it was resealed by the agent. It may be true that he had no right to do so, and that the defendant did wrong in permitting the inspection, no evidence of title or right to possession having been shown, but it is a *non sequitur* to say, upon these facts, there was a delivery. It may have been an unauthorized act of dominion over the property; but whose act was it? Clearly that of the railroad company, for the property was still in its actual and legal custody. It never parted with its possession. Not every wrongful act on the part of a common carrier authorizes an action against it for a conversion. Where goods intrusted to a common carrier are injured only, the owner's remedy is for damages for the injury, not their value." * * * What is the nature of the plaintiff's injury here? Inspection did not injure the property, so far as disclosed. It prevented the consummation of a sale to Sharp. Can that constitute the basis of an action for the value of the property? That it could not is so obvious that no such claim is made, and this branch of the contention is founded upon the extremely fanciful theory of a technical delivery, for which no authority has been found."

But under the Carmack Act the limit of the loss which the shipper has suffered is prescribed. If the property is sold with-

App. Div.] Fourth Department, March, 1912.

out authority so that the carrier asserts title in hostility to the claim of the shipper, an action of conversion may be maintained. No such deprivation of ownership is shown in this case.

The judgment should be affirmed, with costs.

All concurred; FOOTE, J., not sitting.

Judgment affirmed, with costs.

**CHARLES R. CROSBY, Respondent, v. DELOS A. WOLEBEN,
Appellant.**

Fourth Department, March 6, 1912.

**Real property — landlord and tenant — lease of farm on shares — right
of tenant to sell interest in unripe fruit — termination of lease —
rights of vendee.**

A tenant renting a farm on shares under an agreement whereby he was to pick and pack the grapes grown thereon, to furnish one-half the packages for marketing them and to deliver them at a shipping point, and in return was to receive one-half the proceeds from their sale, can sell his share of the grapes when the same come into existence, although they may not be sufficiently ripe to pick.

Under the agreement the tenant and the owner of the farm were tenants in common of the grapes which, as soon as they came into existence, were personal property.

The termination of the contract of letting by the owner and tenant before the grapes were picked did not extinguish the interest in the grapes which the tenant's vendee had acquired by the bill of sale which he had duly filed.

Where the owner, with knowledge of the bill of sale given by the tenant, terminates the contract of letting and appropriates the whole crop of grapes to his own use, he is liable in conversion to the tenant's vendee for one-half the value thereof less one-half the expense of harvesting and marketing them.

MCLENNAN, P. J., and KRUSE, J., dissented, with opinion.

APPEAL by the defendant, Delos A. Woleben, from a judgment of the County Court of Chautauqua county in favor of the plaintiff, entered in the office of the clerk of said county on the 22d day of July, 1911, upon the decision of the court rendered after a trial before the court without a jury.

Fourth Department, March, 1912.[Vol. 149.]

William S. Stearns, for the appellant.*Nelson J. Palmer*, for the respondent.

SPRING, J.:

The action is in conversion. On the 31st day of August, 1906, the defendant entered into a written agreement with John E. Stebbins for the letting on shares of a farm of 120 acres, of which the defendant was the owner, and for the period of five years from the first day of March following. Stebbins went into possession in pursuance of the agreement and continued to carry on the farm until about the 1st of October, 1909. A considerable portion of the farm was devoted to the cultivation of grapes. By the terms of the agreement Stebbins was to "pick and pack the grapes," to furnish one-half of the packages for their marketing and to deliver them to a shipping point in the town of Portland, in which the farm was situated, and each was to have one-half of the amount received for the same.

On the 21st of August, 1909, Stebbins owed the plaintiff for a store account and also by reason of a promissory note given by Stebbins to him and which had been indorsed and negotiated at a bank by the plaintiff, and the aggregate indebtedness was about \$210. On that day Stebbins executed and delivered to the plaintiff a bill of sale of an undivided one-half of said grapes, which were then on the vines but not sufficiently matured for picking, and said instrument was forthwith filed in the office of the clerk of the said town, and the defendant very soon thereafter was personally informed of the giving of said bill of sale and of the consideration inducing it.

On the 27th day of September, 1909, the defendant and Stebbins entered into a written agreement terminating the original contract and providing that Stebbins should remove from the farm on or before October fourth, and that the defendant "shall retain all crops harvested and unharvested." The plaintiff demanded one-half of the grapes, offering to pay one-half the expense of picking and marketing the same in accordance with the terms of the contract of letting. The defendant repudiated the plaintiff's title and gathered and sold the grapes, and thereafter this action was commenced. The county judge allowed

App. Div.] Fourth Department, March, 1912.

the plaintiff for one-half of the money received for the entire crop, deducting therefrom one-half the disbursements incurred in harvesting and delivering them to the market.

I think he reached a correct conclusion. The grapes were in existence at the time the bill of sale was executed, and they were capable of division by measure or weight and in accordance with the mode of gathering grapes in vogue in that locality.

The defendant and Stebbins were tenants in common of these grapes. (*Rice v. Peters*, 128 App. Div. 776; *Dinehart v. Wilson*, 15 Barb. 595; *Taylor v. Bradley*, 39 N. Y. 129; *Reynolds v. Reynolds*, 48 Hun, 142; Underhill Landl. & Ten. 311.)

The grapes were personal property. Stebbins was the owner of an undivided one-half of them on the vines and, consequently, could dispose of or make subject to a lien his interest therein. (*Sexton v. Breese*, 135 N. Y. 387, 391; *Stall v. Wilbur*, 77 id. 158; *Beck v. McLane*, 129 App. Div. 745; affd., 198 N. Y. 567.)

The termination of the contract of letting by the defendant and Stebbins did not operate to extinguish the interest in the property which the plaintiff had acquired by the bill of sale. (*Tiffany Landl. & Ten.* 1349 *et seq.*; *Eten v. Luyster*, 60 N. Y. 252, 259; *Weiss v. Mendelson*, 24 Misc. Rep. 692; *Dobschuetz v. Holliday*, 82 Ill. 371.)

The defendant is responsible for the relation which operated to vest title to an undivided one-half of the grapes in Stebbins. I appreciate where an occupant terminates the contract of letting during its life, or abandons the occupied premises and has sold or permitted a lien to be created upon his share of the crops, an injustice may thereby inure to the owner of the farm. The owner can easily protect himself from such a mishap by apt provisions in the contract. If he makes the cropper or occupant the owner of a definite part of the products of his farm he must expect that third parties who act in reliance upon the ownership for which he is responsible and to which they have duly succeeded, may maintain their claims. In this case the defendant knew of the bill of sale before the contract of termination was entered into, and yet his rights were well guarded by the court in that whatever expense would have been paid by

Stebbins in picking, preparing for and delivering the grapes to market was allowed to him. He refused to divide the grapes with his cotenant, the plaintiff, and appropriated the whole crop, and was, therefore, liable in conversion to the plaintiff. (*Gates v. Bowers*, 169 N. Y. 14, 17.)

The judgment should be affirmed.

All concurred, except MCLENNAN, P. J., and KRUSE, J., who dissented in a memorandum by MCLENNAN, P. J.

MCLENNAN, P. J. (dissenting):

I dissent upon the ground that the tenant Stebbins, having failed to perform his contract of hiring of the farm in question and having abandoned such contract, had no right, title or interest in or to the produce of such farm, and that his assignment to the plaintiff did not vest him with any interest in the same. The agreement between the landlord and the tenant is not an unusual one. It provides in substance that the tenant shall do all the work in preparing the crop for harvesting and in harvesting the same, and that then the profits of such crop shall be divided equally between the landlord and the tenant. In this case the tenant abandoned his lease or contract after having assigned his interest therein to the plaintiff. The plaintiff made no attempt to carry out and perform the conditions imposed upon the tenant, but waited until the landlord had done and performed at his own expense all the things which the tenant had agreed to do and perform. Then, apparently, there being a profit, the assignee of the tenant assumes to recover one-half of such profit. I think the conclusion reached by the court below is repugnant to our ordinary sense of justice, and that it cannot be supported by any principle of law.

I conclude that the judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

KRUSE, J., concurred.

Judgment affirmed, with costs.

BERNARD J. GOLDSTEIN, Appellant, *v.* CHARLES D. TANK,
Respondent.

Fourth Department, March 6, 1912.

Principal and agent—selling agent—right to receive payment—ratification.

Ordinarily an agent selling an article not in his possession is not authorized to receive payment. This rule, however, is not inflexible; its application depends upon the circumstances of the case.

Where plaintiff upon the order of his agent shipped a fire engine to defendant and the latter paid the purchase price to the agent, and so wrote to plaintiff when he sent him his bill, and plaintiff thereupon for nearly three months endeavored to obtain the money from the agent, using every means to do so, and neither answered defendant's letter nor intimated that the payment to the agent was unauthorized, he by his conduct ratified and assented to the payment as made, and cannot later hold defendant for the price of the engine on the ground that the agent had no right to receive the money.

The plaintiff was under an obligation when notified that defendant had paid the account to the agent to advise defendant promptly if he wished to repudiate the agent's authority.

MCLENNAN, P. J., dissented, with opinion.

APPEAL by the plaintiff, Bernard J. Goldstein, from a judgment of the County Court of Onondaga county, entered in the office of the clerk of said county on the 18th day of September, 1911, reversing a judgment of the Municipal Court of the city of Syracuse in favor of the plaintiff and granting the defendant a new trial before the same judge.

Louis L. Waters, for the appellant.

Edgar F. Brown, for the respondent.

SPRING, J.:

Under date of November 15, 1910, the plaintiff, who was carrying on business in the city of New York under the name of Ajax Fire Engine Works, in reply to a letter from the Syracuse Chemical Fire Extinguisher Company, wrote stating the price of one of its fire engines, with the conditions of sale, and also sent circulars and printed matter relative to the same. On the eighteenth of November the defendant, living in Syracuse,

Fourth Department, March, 1912.

[Vol. 149.]

ordered an Ajax chemical fire engine of the Syracuse Fire Extinguisher Company, stipulating in the order that the sale was to be made on thirty days' approval, etc. This letter Mr. Webb, who was the extinguisher company, forwarded to the plaintiff. On the nineteenth of that month the plaintiff acknowledged to the fire extinguisher company the receipt of this order, and at the same time stated that it would require the extinguisher company to "guarantee the account in question." On the same day the plaintiff also wrote a letter to the defendant thanking him "for your order sent through our Agents, The Syracuse Fire Extinguisher Company," and adding that shipment would be made in a few days. On the twenty-second day of November the plaintiff shipped directly to the defendant the fire engine which he had ordered through the Syracuse company, conforming in its stipulations to those embodied in the order which the defendant had delivered to the Spracuse agent. At the same time the plaintiff wrote to his Syracuse agent advising it of the shipment of the engine to the defendant and giving it instructions as to testing the machine, etc.

There was nothing in the letters from the plaintiff to the defendant advising the latter to make payment directly to it, and on the twentieth day of December the defendant gave a check to the Syracuse Fire Extinguisher Company in payment of the engine which he had purchased.

We appreciate the existence of the general rule that a selling agent selling an article not in his possession is not authorized to receive payment for such article, but the rule is not an inflexible one and its application in a given case depends upon the circumstances connected with the transaction. (*Scott v. Hopkins*, 2 N. Y. St. Repr. 324.)

The order for the engine was given by the defendant directly to the agent and he knew nothing of the relations existing between it and the plaintiff. The plaintiff had advised the defendant in his first communication that the extinguisher company was his agent, and in the letter accompanying the shipment of the machine there was no suggestion that payment should not be made to the agent. Again, it required the agent to guarantee the account, which made Webb or his company

App. Div.] Fourth Department, March, 1912.

primarily liable for its payment, and so he had an interest which, perhaps, gave him authority to receive payment, although the evidence does not show that he did in fact make the guaranty required.

Even if these facts are not sufficient to establish that the agent was authorized to receive pay for the engine, they do indicate that in the actual communication between the parties there was no suggestion to the defendant that the purchase price of the engine should not be paid to the agent.

Passing this question, however, we think the evidence shows that the plaintiff by his subsequent conduct ratified or assented to the payment made by the defendant to the agent of the plaintiff. On the 5th of January, 1910, the plaintiff wrote to the defendant, referring to the shipment of the fire engine, and stating that the account was overdue. On the seventh the defendant answered this communication advising the plaintiff that he had paid the account to Mr. Webb of the Syracuse Fire Extinguisher Sales Company of whom the engine was ordered. On the ninth the plaintiff wrote to its agent in Syracuse, advising it of the letter of the defendant and asking that it give immediate attention to the matter and send a check by return mail. This was followed by a series of letters, which, apparently, did not elicit any reply. They were all written in an attempt to collect the account of the agent, although after the first letter the plaintiff disclaimed any authority in the agent to receive payment. A time was fixed in one of the letters within which the payment must be made. Finally the account against its agent was left with a mercantile agency company in New York city, and on the second of March it wrote to the agent demanding immediate settlement of the claim. This was followed by a further communication from the same agency company on the fourteenth of that month. There was no reply during all this time to the letter of the defendant to the plaintiff of January seventh, and no intimation that the payment to the Syracuse agent was unauthorized and no letter, apparently, ever was written after January seventh by the plaintiff to the defendant; but, about the first of April, the attorneys for the plaintiff formally demanded the payment of the account, which was refused. I think the obligation was upon

Fourth Department, March, 1912.

[Vol. 149.]

the plaintiff, when the latter notified him of the payment of this account to the plaintiff's agent, to advise him promptly if it was expected to repudiate the authority of its agent. (*Glor v. Kelly*, 49 App. Div. 617, 619; affd., 166 N. Y. 589; *Clark & Skyles Agency*, 337; *Hope v. Lawrence*, 50 Barb. 258.)

The plaintiff elected to look to his agent for pay and pursued that course unvaryingly for nearly three months, and apparently until the effort was hopeless, and whatever he might say in some of his communications challenging the authority of the agent to receive payment, he was all the time ratifying the agent's conduct in receiving this money from the defendant.

The judgment of the County Court should be affirmed, with costs of this appeal to the respondent.

All concurred, except McLENNAN, P. J., who dissented in an opinion.

McLENNAN, P. J. (dissenting):

The facts are not in dispute. At all the times mentioned plaintiff was doing business as the Ajax Fire Engine Works, having his principal office and place of business in the city of New York. Before any of the transactions referred to occurred a certificate had been duly filed by the plaintiff, authorizing him to do business by and under such name. Without contradiction it appears that the Syracuse Chemical Fire Extinguisher Company was employed as agent for the plaintiff to sell one of its fire engines to the defendant, and that such sale to the defendant was consummated through such agency. The terms of sale having been agreed upon by the defendant through such agency with the plaintiff, the sale was consummated by the shipment of the engine, which is the subject of this litigation, to the defendant, billed to him in the regular way by a regular bill of lading, and at the same time a bill for the purchase price of such engine was sent to the defendant. So that we start with the proposition that the engine was in the possession of the plaintiff until shipped to the defendant, and transfer of such possession was made to the defendant through such bill of lading, and also, at the same time the defendant was informed of plaintiff's claim against him for the purchase price of such engine.

App. Div.]

Fourth Department, March, 1912.

Even before the purchase price for such engine became due and payable to the plaintiff, it transpired that the defendant paid one Webb, president of the Syracuse Chemical Fire Extinguisher Company, the purchase price of such engine, and when plaintiff requested payment from the defendant, the plaintiff was notified that the purchase price had been paid to his selling agent. Thereupon concededly the plaintiff by various correspondence, threatening and otherwise, extending over a period of two and one-half months, sought to induce the selling agent, viz., the Syracuse Chemical Fire Extinguisher Company, to turn over to him the money which had been placed in its hands by the defendant, the purchaser of plaintiff's machine. Such negotiations with the agent came to naught; nothing could be recovered in that regard, and so the plaintiff asks the defendant to pay the purchase price of the machine which he had received and which concededly he had not paid; and the question is, under such circumstances is the seller of goods precluded from recovering therefor? The law, as I understand it, is well settled that the seller of goods who is not in possession of the same has no actual or implied authority to receive the purchase price of the same, and that the purchaser who makes payment therefor to such selling agent does so at his peril. (*Higgins v. Moore*, 34 N. Y. 417.) The authority of this case has never been questioned, and if such is the law the defendant is in no better position than as if the plaintiff had said to him, "The Syracuse Chemical Fire Extinguisher Company is our agent to sell, but is not our agent to collect, and you must not pay to it. The remittance must be direct to me." Of course, under such circumstances, if the purchaser of goods had violated such instruction and paid the price thereof to the seller's agent, he would not be relieved from again paying to the seller of the goods. The law says an agent to sell is not an agent to collect, where the goods are sent direct to the purchaser from the seller and a bill sent running to the seller for the purchase price. And this has been so decided as matter of law. Indeed, if it were otherwise it would be unsafe for commercial houses and manufacturers of goods to trust the sale of their products to drummers or sales agents.

In this case there is no suggestion that there was any course of dealing between the agent, the plaintiff or the defendant which would have led the defendant to understand, believe or know that he was authorized to pay the agent for the goods, the invoice for which he received direct from the plaintiff with a bill asking for payment accompanying the same.

It is suggested that this judgment of reversal can be sustained because after the defendant had informed the plaintiff that the purchase price of the engine had been paid to his selling agent the plaintiff did not immediately or within two and one-half months repudiate such payment. Instead, it is conceded that the plaintiff sought, having been advised by the defendant that the agent had the money which belonged to the plaintiff, to induce such agent to turn it over to the plaintiff, and after a struggle of two and one-half months, that failing of accomplishment, he brought this action to recover the purchase price of the engine from the defendant, who received it from the plaintiff with a fair statement that the purchase price was due from the defendant to the plaintiff. Notwithstanding, without any authority from the plaintiff, the defendant assumed to pay the selling agent. After the plaintiff had been informed that such purchase price had been paid to its selling agent, he tried for two and one-half months to make his agent refund to him the moneys thus received. Failing in such endeavor, this action was brought. I think there is nothing in the evidence to indicate that the plaintiff intended to accept the agent as its debtor in the premises, and that no action upon his part in attempting to collect from the agent, who the defendant said had his money, for two and one-half months, effected an estoppel so as to prevent the plaintiff from pursuing his remedy against the defendant as for goods sold and delivered.

There is no suggestion in this case that any change had taken place in relation to the parties, nothing to indicate that the selling agent was not quite as responsible at the time of the trial as he was when the plaintiff was informed that the money had been paid to him.

I think the case of *Glor v. Kelly* (49 App. Div. 617) is easily distinguishable from this case. There the situation of the

App. Div.] Fourth Department, March, 1912.

parties had materially changed. The agent and the purchaser were both dead, and more than two years had elapsed after plaintiff had been informed that the purchaser had paid to the agent the amount of the purchase price. And also it appeared in that case that after having pursued to the utmost the agent and having found that his estate was insolvent, the plaintiff sought then to have recourse to the estate of the defendant. While that case was decided by a divided court, I think even the prevailing opinion cannot be regarded as supporting the contention of the defendant in this case.

Upon the trial before the judge of the Municipal Court, a jury having been waived, the judge was entitled to find any reasonable inference permissible by the evidence as to whether or not the plaintiff had ratified the unauthorized act of his agent in receiving the purchase price of the engine in question, and it must be assumed that the decision of the court was adverse to the defendant upon that proposition, and we think the finding of the Municipal Court judge in that regard is amply justified on all the evidence.

It follows that the judgment of the County Court should be reversed and the judgment of the Municipal Court affirmed, with costs to the plaintiff in this court and the County Court.

Judgment affirmed, with costs.

In the Matter of the Judicial Settlement of the Accounts of
NATHAN J. LOWE and DAVID L. JOHNSTON, as Executors, etc.,
of SARAH J. CLEMENT, Deceased.

HELEN C. SPRINGER, Appellant; JOHN DAVIDSON and Others,
Respondents.

Fourth Department, March 6, 1912.

Will construed — gift of printing business — when assets pass under such devise.

A testatrix who died leaving only one descendant, a daughter, and nephews and nieces, devised and bequeathed to the daughter "my printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, office furniture, and equipment of every nature connected with said business." She gave to the daughter

Fourth Department, March, 1912.

[Vol. 149.]

the life use of her dwelling house and \$5,000 absolutely, making specific legacies to relatives and friends and leaving the residuary estate to her nephews and nieces.

The printing establishment and its assets, which had come to her from her husband, she kept distinct from the rest of her property so that everything pertaining thereto was readily ascertainable. At her death certain printing contracts were nearly completed which later resulted in substantial profits which were paid to the executors.

Held, that construing the will in the light of the surrounding circumstances the testatrix intended that the bills receivable from the printing establishment and cash on hand should go to her daughter rather than to the collateral relatives, as otherwise the business would be stripped of nearly all its working capital.

Held, further, that under the circumstances the bequest to the daughter of \$5,000 was not intended to furnish working capital for the business.

MCLENNAN, P. J., and FOOTE, J., dissented, with opinion.

APPEAL by Helen C. Springer from a decree of the Surrogate's Court of the county of Erie, entered in said Surrogate's Court on the 13th day of April, 1911, upon the judicial settlement of the accounts of the executors of the will of Sarah J. Clement, deceased.

Vernon Cole, for the appellant.

Simon Fleischmann and George S. Potter, for the respondents.

SPRING, J.:

Mrs. Sarah J. Clement, a resident of Buffalo, died October 23, 1908, leaving a last will and testament, which was soon thereafter admitted to probate and letters testamentary issued to the executors named therein. She left one daughter, her only child or descendant, the appellant, and nephews and nieces.

By the second provision of her will she provided: "I give, devise and bequeath to my daughter, Helen Springer, my printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, office furniture and equipment of every nature connected with said business."

She also bequeathed to the daughter her household furniture, jewelry, horses, carriages and stable equipment, the use during her natural life of a dwelling house occupied by the testatrix and the sum of \$5,000 absolutely. She disposed of considerable of the residue of her property by general and specific legacies, some to relatives and some to friends, who

App. Div.]

Fourth Department, March, 1912.

were not related to her, and made the five nephews and nieces, who are the respondents, the residuary legatees and devisees.

The printing office and bindery had been organized and developed into a successful business by Mr. Clement, the husband of testatrix and the father of the daughter Helen, and who died in February, 1907, leaving the business to his widow, who conducted it along the same lines adopted by her husband until her death, twenty months later. She had considerable other income-producing property, but the printing business, which had become profitable and extensive, she always kept separate and distinct. It was carried on in the name of her deceased husband as before his death, and the bank account connected with it was kept in the same name, so that at the time of her decease everything pertaining to it was readily ascertainable.

Her will was executed in April preceding her death. When she died there was a large contract for printing almanacs which was practically completed, and a small quantity of the almanacs had been delivered, but no part of the purchase price had been paid. Within three months this contract was fully consummated and over \$11,000 paid to the executors. There were also due to the testatrix at the time of her death nearly \$15,000 in open accounts and from which has been gathered in by the executors nearly \$12,000, and there were liabilities of about \$7,000 growing out of the printing business and about \$500 in a bank to the credit of this account. The executors paid the debts from the accounts; and collected and tentatively transferred to the appellant all printed merchandise, accounts and sums collected; and by the terms of the agreement of transfer the ownership of said property was to be determined by the Surrogate's Court of Erie county.

The executors filed their account. Objections were interposed on behalf of the residuary legatees, who claimed they were entitled by the provisions of the will to all the accounts accruing from the bindery business and to the cash in banks, and that the debts arising from it should be paid out of the general fund in the custody of the executors, and the Surrogate's Court has held with them.

In endeavoring to reach the intent of the testatrix in the dis-

Fourth Department, March, 1912.

[Vol. 149.]

position of the bindery business, it is important to keep in mind her comprehension of that industry as a going concern. She received with the plant the accounts and money on hand comprising its equipment and readily to be identified and distinguished from the other property of her husband. She sedulously maintained this division and transmitted the estate upon her decease so that the component parts of the business were easily to be ascertained. This successful business, it is fair to assume, she intended to transmit as a family heritage to her only child, to be carried on in her behalf without impairment of its efficiency or volume. To strip it of its bills receivable and the small amount of cash to its credit would destroy its working capital and leave nothing connected with the business from which money could be derived to meet the weekly payroll of \$1,200 or over. It is unreasonable to believe that this mother designed to deprive her daughter of the fruits of this family patrimony so essential for its management and operation. We should not interpret the will in such a way as to make this serious invasion upon the live assets of the business, unless the language of the bequest clearly calls for that construction. The only available assets were grouped in these due and accruing accounts and the small sum in cash. If the daughter was to carry on the business without these assets, she must add a considerable sum in cash to it and practically commence anew without any working capital.

But it is urged that the bequest of \$5,000 was intended to compensate for this deprivation of the working capital from the business. In its place in the will this general bequest is not connected with the disposition of the bindery business. It is the last gift to the daughter, following the devise of the use of the family residence. The testatrix had an income independent of that accruing from the bindery plant. She did not permit her daughter to share in this investment property aside from the legacy mentioned. She probably realized the importance of a separate income to provide against failure in earning capacity of the business at any time, and possibly that reason may have induced this bequest of \$5,000, if any explanation be required of a legacy by a mother to her only daughter and next of kin.

App. Div.]

Fourth Department, March, 1912.

Let us consider the provision itself. She first bequeaths the bindery business and plant in a broad bequest. She then adds, "together with all the presses," etc. — not words of restriction, but specifying some of the chief tangible property in the plant. She did not intend to cut down or limit the large bequest, but to make clear that in addition to the plant and business in its entirety, these principal items physically in the plant should unmistakably pass with the business. She then added the clause, going again from the definite to the general, "office furniture and equipment of every nature connected with said business." It seems to me she had in mind disposing of the entire business and plant as she had regarded and treated it. She did this by the sweeping transfer, and then in order to identify a few of the big features of the movable property actually in the plant she hitched them onto the general bequest.

The learned surrogate in his opinion (73 Misc. Rep. 178) relied, to some extent, upon *Matter of Long Island L. & T. Co.* (92 App. Div. 5). In that case the testator, a lawyer and who drew the will himself, by its 3d clause gave to his son, Dwight, "all my law business, law books, papers, safe, bookcases and office furniture, and all property pertaining to my business." At the time of his death the testator had claims due him for legal services, and the son asserted that the bequest included these items, and the court held otherwise. The son was not admitted to the bar at the time of the testator's death and considerable importance in the opinion is attached to that fact, and also to the fact that the will was prepared by the testator, "a lawyer of large experience." The claims due a lawyer as compensation for services are not property pertaining to his business in the sense that bills receivable are to an industry requiring a large amount of money in its ordinary operation.

In *Matter of Reynolds* (124 N. Y. 388), also cited by the court below, the testator devised and bequeathed to his son real property upon which were buildings, "including all the furniture and personal property in and upon the same, or in any manner connected therewith." The office of the testator upon this devised property contained a vault in which were stored money and securities, and the court held they did not pass to the son by the will. The provision is not similar to the one in

Fourth Department, March, 1912.

[Vol. 149.]

controversy. The facts disclosed connected with the operation of the bindery business are illuminating in enabling us to arrive at the intention of the testatrix in disposing of that business to her daughter. It is not very satisfactory to cite authorities in construing uncertain clauses in a will. In one case the will may receive a restricted interpretation and in another a more liberal construction may be necessary to carry out the apparent purpose, which is the aim the courts seek to make effective.

I think the decree of the Surrogate's Court should be reversed, and the matter remitted to it for further proceedings in accordance with this opinion, with costs of this appeal to the appellant to be paid from the general fund.

All concurred, except MCLENNAN, P. J., and FOOTE, J., who dissented in an opinion by MCLENNAN, P. J.

MCLENNAN, P. J. (dissenting):

I think the language used in the 2d paragraph of the will in question is plain and unambiguous; that such paragraph is not repugnant to or inconsistent with any of the other provisions of the will, and, therefore, that such language should be given its ordinary meaning and that the testatrix's intent respecting the bequest thereby made should be ascertained solely from the language so employed.

The paragraph of the will which is the subject of this controversy is as follows:

"Second : I give, devise and bequeath to my daughter, Helen Springer, my printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, office furniture and equipment of every nature connected with said business; also all my household furniture, plate, books, pictures and other articles of use or ornament, including jewelry, together with the diamond rings formerly belonging to her father and one formerly belonging to Mrs. Tucker — except four diamond rings, one with emeralds to be disposed of as hereinafter mentioned. Also my horses and carriages and stable equipment of every kind. Also the use, possession and control for and during the term of her natural life, provided she pays the taxes and keeps premises in good repair, of my house, No. 605 W. Ferry street, in the city of Buffalo, N. Y.

App. Div.]

Fourth Department, March, 1912.

Also the sum of five thousand dollars. Should the said premises, 605 W. Ferry street, not be in my possession at the time of my death, my said daughter may have the use of any other one house, for life, under the same terms and conditions above mentioned, of which I may die seized. The said premises, 605 W. Ferry street, or any other premises chosen by my said daughter, should said premises, 605 W. Ferry street, not be in my possession at the time of my death, to go and form a part of my residuary estate on the death of my said daughter."

The learned surrogate interpreted the provision relating to the printing office and bindery of the decedent as only bequeathing to the appellant the property mentioned in such provision, viz., "my printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, office furniture and equipment of every nature connected with said business," and that under such clause she took nothing else. The contention of the appellant is that because of such language and certain other provisions of the will, the testatrix intended that the appellant should have, in addition to the printing office and bindery, presses, bindery machinery, type, paper on hand, office furniture, etc., all the bills receivable and any deposits in the bank which might exist to the credit of the printing business, which she claims should be awarded to her under the words, "office furniture and equipment of every nature connected with said business."

As before suggested, there is nothing uncertain or ambiguous about the provisions of the will to which attention has been called. The testatrix said: "I bequeath to my daughter certain property," all of which was specified, none of it having any connection with bills receivable or with a credit which might exist in favor of the testatrix in any bank. And still we are asked to believe that from the whole will it should be inferred that the intent of the testatrix was that all her bills receivable, perchance involving her entire estate, should be turned over to her legatee, the appellant in this case.

The surrogate has charged the executors with the amount of such bills receivable and has credited them with the amount of the indebtedness against the printing concern, which they have

paid, but as I understand the position of the appellant it is that she is entitled to the surplus of such bills receivable after payment of the indebtedness of the concern, thereby reducing the interest of the residuary legatees.

In the prevailing opinion a good deal is said about the intention of the testatrix in making her will; among other things, that she, the mother, took the printing concern as a legacy from the father, and that she was anxious that her daughter should continue to own and control such business and that in order to do so successfully it was necessary that she should have capital, and that the \$5,000 as a specific legacy willed to the daughter, was not intended to supply such capital. I have very little notion as to what the testatrix intended to do in the premises. I do not know but that as matter of fact she was desirous that her daughter should close up the printing establishment and go into some other business where she would not need any capital. I am only concerned with the proposition of law as to whether, when a testator or testatrix says, "I give and bequeath my printing office and the machinery connected therewith" and then adds, "and all office furniture and equipment," that language means that there is given to such legatee all the bills receivable accumulated in such business and all the money that may be deposited in the bank to the account of such business. That, as it seems to me, is precisely what the appellant in this case is contending for and what the prevailing opinion about to be handed down by this court means. A testator gives his printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, office furniture and equipment of every nature connected with said business. Can that mean that the legatee is to have all the bills receivable resulting from such business, which perchance may be ten times more valuable than all the things specified in such clause?

It will be observed that the testatrix does not bequeath the business to the appellant; but she bequeaths to her certain specified things, which are perfectly well known and understood if we give heed to the ordinary meaning of the English language; but it is said that somehow in this case "office furniture and equipment" should include and mean cash in the bank, and moneys which have become due and owing and payable to

App. Div.] Fourth Department, March, 1912.

the testatrix during her lifetime. It seems to me that the proposition is not supported by good logic or authority. In *Matter of Long Island L. & T. Co.* (92 App. Div. 5) a father willed to his son "all my law business, law books, papers, safe, bookcases and office furniture, and all property pertaining to my business." It was held unanimously that the fees which the father had earned in his lifetime and which had become valid obligations in favor of his estate, did not pass to the son under such will.

In *Matter of Reynolds* (124 N. Y. 388) it appeared that the testator had given to his son certain real estate situate in the city of Rochester, "including also East arcade (so-called), with all the lands, buildings and appurtenances thereunto belonging, or in anywise appertaining, and including all the furniture and personal property in and upon the same, or in any manner connected therewith, to have and to hold the same," etc. The Court of Appeals held that the personal property, including cash and bonds, which was in a safe in and upon such property, did not pass to the legatee by such bequest. That case contains an interesting review of the English cases, and I think that no case in the whole category can be found in which it is held or intimated that the words "office furniture and equipment of every nature connected with said business," include bills receivable or deposits in the bank to the credit of such business. Other cases cited by the learned counsel for the respondents are instructive, many of them referred to in the opinion of Judge PARKER in the *Reynolds Case* (*supra*). (*Brown v. Quintard*, 177 N. Y. 84; *Bunyan v. Pearson*, 8 App. Div. 86; *Mann v. Mann*, 14 Johns. 1, affg. 1 Johns. Ch. 231; *Fleming v. Brook*, Schoales & L. 318; *Andrews v. Shoppe*, 84 Maine, 170.) Jarman on Wills (Vol. 1, p. 751) collates a number of such authorities, and all, as it seems to me, are of the same tenor and effect, although the language may be quite different, that a testatrix who gives to a legatee a certain printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, *office furniture and equipment of every nature connected with said business*, does not intend thereby to bequeath bills receivable which may have been the result of years of accumulation and constitute perchance practically her

Fourth Department, March, 1912.

[Vol. 149.]

entire estate. The language employed, given its ordinary interpretation, does not say or mean, as it seems to me, any such thing.

I conclude that the decree of the surrogate is right and should be affirmed, with costs payable by the appellant.

Foote, J., concurred.

Decree of Surrogate's Court reversed and matter remitted to the Surrogate's Court, with directions to proceed in accordance with the opinion of SPRING, J., with costs and disbursements to the appellant payable out of the estate.

WARREN JACOBUS, Appellant, v. JAMESTOWN MANTEL COMPANY, Respondent.

Fourth Department, March 6, 1912.

Bills and notes — transfer after maturity — corporation — ultra vires — accommodation paper — principal and agent — when notice to officer of trust company notice to corporation — facts not showing scheme to defraud corporation — when treasurer of business corporation not authorized to sign negotiable paper — implied authority, when question of fact.

Where a promissory note is transferred after maturity the maker when sued by the transferee may take all defenses available against the transferor. A business corporation has no power to issue or indorse for the accommodation of others promissory notes in which it has no interest.

Where the note of a corporation made for the accommodation of a third person is transferred after maturity, the transferee in order to hold the maker must show that his transferor was a holder for value in good faith before maturity.

A trust company which at the instance of its vice-president, who was an active member of its investment committee, accepts a promissory note, is chargeable with his knowledge that it was made by a business corporation for the accommodation of a third person.

The rule that notice to such officer is not notice to his corporation if he is engaged in a scheme to defraud his company for the benefit of himself and others, does not obtain where it appears that when at the time he induced the corporation to take the note he did not know of its invalidity as corporation accommodation paper.

Evidence in an action upon an accommodation note made by a business corporation examined, and held, that the court was justified in finding

App. Div.] Fourth Department, March, 1912.

that although an officer of a trust company having induced his company to discount the notes, afterwards converted the proceeds which were to go to an indorsee, he had no previous intention to defraud his corporation.

It seems, that the mere fact that a negotiable instrument is signed by an officer of a corporation does not of itself prove his authority to issue the instrument.

The by-laws of a business corporation conferred authority only on its president to sign negotiable paper. Evidence examined, and *held*, insufficient to show a waiver of the by-law so as to give the treasurer of the corporation implied authority to sign the paper.

Though it appears that the treasurer of such corporation had made other notes like the one in suit, that fact alone is not sufficient to charge the corporation with liability on the note as a matter of law. At most the acquiescence of the corporation in the signing of promissory notes by its treasurer contrary to the by-laws raised a question of fact as to his authority to do so.

MCLENNAN, P. J., and KRUSE, J., dissented, with opinion.

APPEAL by the plaintiff, Warren Jacobus, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Chautauqua on the 28th day of August, 1911, upon the verdict of a jury, rendered by direction of the court, dismissing the complaint, and also from an order entered in said clerk's office on the 15th day of August, 1911, denying the plaintiff's motion for a new trial made upon the minutes.

Yorke Allen, for the appellant.

August Becker, for the respondent.

ROBSON, J.:

The action is based upon a promissory note, of which the following is a copy:

"\$2,500.00

NEW YORK, Oct. 8, 1909.

"Six months after date we promise to pay to the order of ourselves Two Thousand five Hundred & 00/100 Dollars at Newton Trust Co., Newton, N. J. Value received.

"JAMESTOWN MANTEL CO.

"GEO. M. TURNER, *Treas.*"

Indorsed: "JAMESTOWN MANTEL CO.

"GEO. M. TURNER, *Treas.*"

Fourth Department, March, 1912.

[Vol. 149.]

This was the last of a series of renewals of like tenor the original note of the series bearing date August, 1907.

The defendant, Jamestown Mantel Company, is a domestic manufacturing corporation located in Chautauqua county, and the original note of the series was purchased by the Newton Trust Company, a banking corporation located at Newton, N. J. Plaintiff is the holder of the note in suit by transfer thereof from the Newton Trust Company after maturity. His connection with the transaction is not explained further than that simple fact. Of course, any defense to the note, if it were still owned by the trust company, remains equally available to defendant in this action.

It is not disputed that the original note was an accommodation note pure and simple, that defendant had none of the proceeds thereof, received no advantage therefrom in any way and had no power expressly conferred upon it to make accommodation paper. *Prima facie* the note, as well as each of the renewals, was entirely unauthorized, and, therefore, invalid; for it is well established that a corporation has no power to issue, or indorse for the accommodation of others, notes in which it has no interest. (*National Park Bank v. German-American Mutual Warehousing & S. Co.*, 116 N. Y. 281; *Fox v. Rural Home Co.*, 90 Hun, 365; affd., 157 N. Y. 684.) It was necessary, therefore, for plaintiff to show that his transferor, Newton Trust Company, was a holder for value in good faith and before maturity.

The Newton Trust Company invested to a considerable extent in commercial paper, and its directors had named an investment committee consisting of three members of the directorate, viz.: Hough, its president; Searing, its vice-president, and George, apparently a director. Plaintiff's witness, Hough, testified that the duties of this committee included the purchase and sale of "such paper as might be for the interest of the bank to buy or sell. When the bank had money to loan it would advise the Committee in New York of the fact, and ask them to purchase paper; secure some. Sometimes they would call us up and ask us if we had any money to loan, and state at the same time that they had some good paper in which we could invest if we had the funds." And on such occasions, if

App. Div.] Fourth Department, March, 1912.

they recommended the paper, if the bank had the money, "we would say send it on." The trust company's connection with the note in question originated "under such a method." The investment committee was appointed for the purpose of passing on all of that paper. Hough lived at Newton and Searing and George were the constituent members of the firm of Searing & George, bankers and brokers, doing business in the city of New York. Searing was a lawyer, as well as a banker, and besides being vice-president of the Newton Trust Company, seems to have been connected with another trust company at Dover, N. J., and was also the president of a railroad corporation known as the Delaware and Eastern Railroad. Welch, a lawyer doing business in New York, was the attorney for this railroad company, and also acted as Searing's attorney. He had also done some business for the defendant. In August, 1907, the railroad company was indebted to Welch in a considerable amount for services; and, as a result of his demand upon Searing, its president, for a payment on account, the company not then being in funds, he was told by Searing that if he "could borrow a note from somebody for a short time," Searing would have it discounted for him at one of Searing's trust companies. Welch then saw Turner, the treasurer of defendant, and got the original note of the series. This, as he testifies, he delivered to Searing, who said "he would try to have it discounted for me at one of his trust companies, meaning the Newton Trust Company and the Dover, he represented that he controlled both of them. Then I gave him the note and he said he would send me the proceeds." Searing thereupon called Hough at Newton on the telephone, and, though Hough does not recollect the conversation in any of its details, an arrangement seems to have been made by which the trust company was to take the note, for on the sixth of August Searing inclosed it in a letter to Hough stating that he was inclosing it in accordance with the telephone conversation of that date, and asking that he remit the proceeds. On receipt of the note Hough inclosed in a letter to Searing a draft for \$2,425 payable to the order of Searing & Co., stating it was net proceeds of note of Jamestown Mantel Company. Searing cashed the draft, and, instead of turning the proceeds over to

Fourth Department, March, 1912.

[Vol. 149.]

Welch, kept them, telling Welch that his companies were not then in funds, but that he might be able to get it later. Before the note matured he told Welch he had discounted the note; but had used the money himself, as he needed it very badly. When the note became due, Welch, at Searing's request, got from Turner a renewal; and thereafter, as the notes matured, renewals were obtained by Welch from the same source, and sent by him or Searing, usually with his check for the discount, for which he was then or thereafter reimbursed by Searing. Hough says that he did not know the defendant, or Turner, or where the corporation was located, and made no inquiry as to the note or the financial responsibility of defendant; and, as he says, "Simply the fact that it came to us from two members of this investment committee who had facilities for knowing all about it, satisfied me." Again he says: "I relied on the information of the purchasing committee." This trust company, as is apparent from the evidence, had had many dealings with Searing & Co. in the purchase of similar securities; and its management was willing to rely upon the judgment of those members of its investment committee, Searing's judgment being especially favored, as to the merit of securities in which they dealt; and also to be content to deal with them in the dual capacity of brokers selling commercial paper and members of its own investment or purchasing committee.

Searing had full knowledge of the fact that this was an accommodation note. It is a familiar principle that notice coming to an officer of a company (*i. e.*, Searing, the vice-president and active member of its investment committee, having by direct delegation personal supervision and management of similar concerns for it) is notice to the company. But plaintiff claims that this case comes within the exception to this general principle, that when the officer to whom the notice came was not at the time acting in good faith for his company, but, on the contrary, in the execution of some sinister scheme of his own at the expense of his company, and for the benefit of himself or others in hostility to his company—that then notice to him is not notice to his company. Among the many cases in which this exception has been recognized

App. Div.] Fourth Department, March, 1912.

are *Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.* (193 N. Y. 551) and *Henry v. Allen* (151 id. 1). But the facts as shown by the evidence do not bring this case within the exception. Searing's proposition to Welch was that he should borrow a note, which he would have discounted. This indicated only that Searing intended that an accommodation note, valid as such, was then in his mind. From whom it was to be obtained was not discussed. Welch, acting on the suggestion, produced the note in question. Whether it was or was not valid was not then, or at any time, the subject of discussion between Searing and Welch; and the evidence does not point to the conclusion that either of them then had in mind the fact that the note was invalid, as being corporation accommodation paper. For aught that appears, they both might then have honestly believed that the note was just as valid as any other accommodation paper. If that be true, then certainly no intention to defraud the trust company can be presumed, so long as Searing's action can be explained consistently with an honest purpose. (*Lopez v. Campbell*, 163 N. Y. 340.) Doubtless Searing's intent and purpose in the transaction was to be determined by the trial court as matter of fact. This he has apparently passed upon favorably to defendant's claim that no intention to defraud or act adversely to the interests of his principal in the transaction, the Newton Trust Company, was shown. The trial justice says in his opinion: "His [Searing's] interest was, therefore, not such as to suggest a scheme to defraud his principal, in which case the presumption is he would not disclose but rather keep secret what would expose and defeat his purpose. It is true after the bank remitted the proceeds of the note Searing converted them; but there is nothing in the evidence even tending to show that he had formed a purpose to convert before he received the proceeds. The mere fact that he did convert is not enough to raise the presumption that he planned this out so he could steal the money." Such a finding is supported by the evidence and should not be disturbed. Upon this ground alone the judgment should be affirmed.

Appellant is also confronted with the initial difficulty that it does not appear that the note is in fact the note of defend-

Fourth Department, March, 1912.

[Vol. 149.]

ant. Defendant was the payee named in it and in each in the succession forming the series of renewals. They were signed "Jamestown Mantel Co., Geo. M. Turner, Treas.," and indorsed in like manner. Of course a corporation must necessarily act by agents, and they, "like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority." (*Alexander v. Cauldwell*, 83 N. Y. 480, 485.) The note and its renewals were all concededly made and signed by defendant's treasurer. I quote from Daniel on Negotiable Instruments (Vol. 1 [5th ed.], § 394): "The treasurer of a corporation authorized to pay and discharge a debt is not thereby empowered to execute a note for it, being without funds in hand. And the treasurer of a corporation is not such an officer as is vested with implied power to make negotiable paper in its name, though particular circumstances might exist which would create such an implied power." To a similar effect are the statements in reference to the same subject found in Edwards on Bills (§ 65) and Beach on Private Corporations (Vol. 2 [2d ed.], § 804). Indeed, it would seem that without proof of authority to make negotiable paper the simple fact that such paper was signed by any officer of a corporation, even the president and secretary, does not show that it was made by its authority. (*People's Bank v. St. Anthony's R. C. Church*, 109 N. Y. 512, 523.) It is true that authority may be shown in various ways. But in this case defendant's by-laws, which are in evidence, gave such authority only to its president. Implied authority in the treasurer to sign notes for it was sought to be established on the trial by showing that the treasurer had in fact signed other notes for the corporation. One such note, made about the time the original of the series in question was made, was proved, and also the fact that it had been paid by defendant. Turner himself swears that he signed other notes and that he believes the company honored them. There is also some general evidence by a banker and a bookkeeper of defendant that notes signed by the treasurer were paid by the company. The dates or particulars of these notes are not given, and the evidence is most general in character, entirely insufficient to warrant a finding that the provisions of the by-laws were consciously and inten-

App. Div.]

Fourth Department, March, 1912.

tionally disregarded, and implied authority conferred upon the treasurer to do what they by express provision had limited to the president as a power to be exercised by him alone. It should also be observed that as Turner says the other notes of the company, which he signed, were all made and honored in the ordinary course of business of the company, and there is absolutely no evidence to show that he ever had signed an accommodation note in the company's name, except those of this series. Though it had been shown that Turner had made many other notes in manner like the one in question, that of itself would not be sufficient to charge defendant as matter of law with liability on the note in question. (*National Bunk v. Navassa Phosphate Co.*, 56 Hun, 136.) At most, even a long acquiescence in the practice of permitting such signing and indorsement, not otherwise directly authorized, or done by authority necessarily to be inferred from the circumstances, presents simply a question of fact to be passed upon as other questions of fact are determined. (*Bank of Monongahela Valley v. Weston*, 159 N. Y. 201; *Smith v. Weston*, Id. 194.) The questions there considered involved the right of a partner to indorse the partnership name as accommodation indorser; but the same principle applies here. The by-laws gave no authority to the treasurer to sign notes. In fact, as I have said, such authority was withheld because it was in terms conferred upon another officer. It was, therefore, as was said by CULLEN, J., in *Bangs v. National Macaroni Co.* (15 App. Div. 522), "necessary for the plaintiff, in order to establish the liability of the defendant upon the notes, to show either acquiescence or ratification by the trustees of the power assumed by the treasurer to issue notes, or such a course of dealing by that officer and such negligence on the part of the trustees as would estop the defendant from denying the treasurer's authority. * * * The evidence we think in this case is insufficient for this purpose. At most it presented no more than a question of fact for the jury." In support of the verdict directed that fact, it should be assumed, was found in favor of defendant's contention. No question of estoppel arises; for so far as appears no one connected with the Newton Trust Company ever knew of Turner, his relations to or connection with

Fourth Department, March, 1912.[Vol. 149.]

defendant, or his activities as its officer, till the first note of the series was presented.

The judgment and order should be affirmed, with costs.

All concurred, except McLENNAN, P. J., and KRUSE, J., who dissented, in an opinion by McLENNAN, P. J.

McLENNAN, P. J. (dissenting):

Many of the facts in this case are not in dispute. The plaintiff is the assignee of a trust company, organized under the laws of the State of New Jersey, and he brings this action to recover upon a promissory note which was held by such trust company and transferred to him, which, in form, was made by the Jamestown Mantel Company, a domestic corporation, signed and executed by its treasurer, a Mr. George M. Turner. The action is brought to recover upon a renewal note, but the validity of such note and the right of the plaintiff to recover thereon depend entirely upon the original note and the circumstances under which it was given.

It appears that one Mr. Hough was president of the Newton Trust Company, plaintiff's assignor, and that a Mr. Searing, who was an attorney and counselor at law and also a member of a brokerage firm in the city of New York, was vice-president of the Newton Trust Company, and that his partner in such brokerage firm was also a director of the Newton Trust Company. Searing was also president of a railroad corporation, and one Welch was in the employ of said railroad corporation and had also rendered personal services for Searing. It appears that their relations were close and confidential. At a certain time Welch demanded of Searing, as president of the railroad corporation, payment for services rendered by him to such corporation. Searing said, in substance, "We are short of money; you procure a note [nothing said about the character of the note] for \$2,500, and I will procure it to be discounted." Thereupon Welch went to Turner, the treasurer of the defendant corporation, and procured from him a note of such corporation, signed and executed by him as treasurer and delivered to Welch. Welch took such note, delivered it to Searing, and Searing, knowing that no consideration had passed to the Jamestown Mantel Company for such note, sent it to the

App. Div.] Fourth Department, March, 1912.

president of the Newton Trust Company, plaintiff's assignor, and asked that it be discounted. The president of the trust company, fully believing that Searing was sending to him a valid instrument, discounted the same and sent the proceeds to Searing, who was one of the committee on investments, and a lawyer, who would be presumed to know the law in such regard. Searing received the proceeds and stole or appropriated the money to his own use. When Welch came to demand the results of the note which he had procured, Searing suggested that he had been hard pressed, that it was absolutely necessary that he should have some money, and that he had in fact used the proceeds of such note for his personal use or benefit. By promises made by Searing to Welch that he would eventually be taken care of in the transaction, nothing further developed for a time. The note thus originally given was renewed from time to time, first at the instance of Searing; then, through the instrumentality of Welch, the treasurer of the Jamestown Mantel Company executed a renewal of the note, and in that manner the giving of a renewal note was continued until the action was brought to recover upon the note involved in this lawsuit.

Under the circumstances disclosed by the evidence in this case I think it conclusively appears that Searing entered upon the perpetration of his fraud upon his trust company when he received the note of the Jamestown Mantel Company from Welch, then knowing full well that the Jamestown Mantel Company was not indebted to Welch for services or otherwise, because he, Welch, had been employed serving the railroad corporation of which Searing was president, and serving Searing. So that my conclusion is that the Newton Trust Company took the note without knowledge of its infirmity; that it was not charged with knowledge such as was obtained by Searing, although an officer and director of the trust company, when engaged in an attempt to perpetrate a fraud upon such trust company, the essential of its success being that the trust company should not know his design in the premises. The authorities pro and con are cited in the opinion of Justice ROBSON.

The question remains whether in any event the defendant is liable, because it is said that the treasurer had no authority to

Fourth Department, March, 1912.

[Vol. 149.]

sign an accommodation note. He had authority, as appears by the uncontradicted evidence, to sign notes, and I fail to understand how a purchaser in good faith is called upon to determine whether one note signed by the treasurer represents an equivalent to the corporation, or whether another signed in the same manner may be regarded as an accommodation note, when either of the notes comes into the hands of an honest purchaser for value. If I am right in my first conclusion that the Newton Trust Company took this note in good faith, believing it to be the valid obligation of the defendant corporation, then it follows, as it seems to me, that it was entitled to recover upon such note.

I think the holding is contrary to the evidence, that the Newton Trust Company knew, or under the circumstances was chargeable with knowledge, that the note in question was an illegal or invalid instrument. I think that the knowledge of Searing, although one of the investment committee, who was, as the evidence conclusively shows, engaged in a scheme to foist upon the trust company for his own purposes paper which he knew was invalid, was not chargeable or imputable to the trust company, and, therefore, that the trust company took such note and all the renewals thereof in good faith, and that the defendant, through its treasurer having put such note upon the market, which could not be distinguished from other notes which clearly he was authorized to execute, viz., those necessary in the ordinary transaction of its business, is liable to the Newton Trust Company, or its assignee, upon the note executed and delivered by its treasurer.

In any event the purpose of Searing was fraudulent, in that his intent was to procure the note to be discounted to pay the obligations of himself or his company to Welch, which was equally as fraudulent as against his bank as if he had determined in advance of receiving the proceeds of the note to apply such proceeds to his own use.

I conclude that the judgment and order appealed from should be reversed and a new trial granted, with costs to the appellant to abide the event.

KRUSE, J., concurred.

Judgment and order affirmed, with costs.

PRIMIANO IANNONE, as Administrator, etc., of FRANK ALOISE, Deceased, Respondent, v. UNITED ENGINEERING AND CONSTRUCTION COMPANY, Appellant.

Fourth Department, March 6, 1912.

Master and servant — negligence — death by explosion of dynamite — evidence — subsequent precautions.

Action to recover for the death of one killed by an explosion of dynamite used for rock excavation. *Held*, that the jury were justified in finding the master negligent in failing to employ means to give warning to employees that a blast was about to be fired.

In such action it is reversible error to allow the plaintiff to show that after the accident the defendant used a whistle to notify employees that a blast was about to be fired.

APPEAL by the defendant, the United Engineering and Construction Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 30th day of June, 1911, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 29th day of June, 1911, denying the defendant's motion for a new trial made upon the minutes.

Clinton B. Gibbs [Layton H. Vogel with him on the brief], for the appellant.

Horace O. Lanza and Angelo F. Scalzo, for the respondent.

ROBSON, J.:

Plaintiff's intestate, an employee of defendant, and being then engaged in its service, was injured by an explosion of dynamite used by it in rock excavation. His death followed as a result of the injury. Plaintiff based his claim that the injury was due to defendant's negligence principally upon the charge that the system, or method, then employed by it to give warning to its employees that a blast was about to be fired was insufficient and improper. Evidence was presented tending to prove that the warning signals used by others for that purpose included the sounding of a steam whistle, or, in the absence of the means of giving that warning, by blowing a horn. A finding that the system of signals then in use by defendant was inadequate was warranted by the proof. But the question of

the inadequacy of the signals then employed was a close one. Plaintiff was permitted to show that after the accident defendant itself adopted and thereafter continued the practice of sounding a steam whistle as a signal that a blast was about to be fired. Defendant duly objected to this evidence and exception was taken to its reception. We think this evidence was incompetent. It was offered and received as a part of plaintiff's evidence in chief and could be considered as then material only for the purpose of showing defendant's negligence at the time of the accident. Evidence of alterations, repairs or improvements made by defendant after an accident is usually incompetent either to show defective conditions at the time of the accident, or for other purposes. (*Corcoran v. Village of Peekskill*, 108 N. Y. 151; *Getty v. Town of Hamlin*, 127 id. 636; *Young v. Mason Stable Co., Ltd.*, 96 App. Div. 305, 310.) The apparent reason why such evidence is both incompetent and prejudicial is thus stated by O'BRIEN, J., in *Clapper v. Town of Waterford* (131 N. Y. 382, 390): "Upon whatever pretence such evidence is put into the case it is generally used to mislead the jury. It is sometimes accepted by them as an admission of negligence, and its natural tendency is undoubtedly to influence them in that direction. Whether the defendant was negligent was a question to be decided upon the facts as they existed at the time of the injury, and anything that was done by the commissioner afterwards could have no legitimate bearing on that question, and since this action now lies against the town such testimony should be excluded." (See, also, 8 Encyc. Ev. 914-918.) Evidence of a subsequent change in the system or method of conducting defendant's business is also incompetent for a like reason. (*Baird v. Daly*, 68 N. Y. 547, 551; *Motey v. Pickle Marble & Granite Co.*, 74 Fed. Rep. 155, 159; *Southern Ry. Co. v. Simpson*, 131 id. 705.)

The case appearing in the record now before us does not present anything to show that defendant claimed that it was, at the time of the accident, impracticable to give a warning signal by the use of a horn, a method suggested by plaintiff's witnesses as a proper one, and no other fact or condition appears as a reason why this evidence was competent as being an exception to the general rule that it is inadmissible.

App. Div.] Fourth Department, March, 1912.

The judgment and order should be reversed and a new trial granted, with costs of this appeal to appellant to abide event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

INTERNATIONAL TEXT BOOK COMPANY, Respondent, v. JOHN FOX, SR., and JOHN FOX, JR., Appellants.

Fourth Department, March 6, 1912.

Pleading — misjoinder of actions — joinder of action against infant with action on parent's guarantee — Justice's Court — practice — objection to misjoinder of actions.

An action against an infant on a contract whereby he was to receive instruction from the defendant cannot be united with an action against his parent on a collateral contract guaranteeing payment by the infant. Where in an action in a Justice's Court the allegations against said defendants are sufficient to constitute separate actions against each, the misjoinder cannot be attacked by demurrer although it appears upon the face of the complaint.

While the Code of Civil Procedure does not prescribe the remedy available to a defendant in a Justice's Court for a misjoinder of actions, *it seems* that the objection to the defect should be raised in the answer by plea in abatement.

The objection to the misjoinder of actions aforesaid is sufficiently raised in a Justice's Court where the answer alleges that there was a misjoinder of parties defendant, that the parties could not be joined in a single cause of action, etc.

MCLENNAN, P. J., and KRUSE, J., dissented, the former with opinion.

APPEAL by the defendants, John Fox, Sr., and another, from a judgment of the County Court of Cattaraugus county in favor of the plaintiff, entered in the office of the clerk of said county on the 25th day of June, 1909, reversing a judgment of the Justice's Court in favor of the defendants.

Henry Donnelly, for the appellants.

M. B. Jewell, for the respondent.

APP. DIV.—VOL. CXLIX. 24

SPRING, J.:

The action was commenced in Justice's Court against the defendant, John Fox, Jr., an infant, on a written agreement whereby he subscribed for a scholarship, and was to receive instruction in bookkeeping and business forms of the plaintiff, and was to pay therefor sixty dollars and eighty cents, in monthly installments of three dollars each after the first cash payment which was made, the complaint alleging that there was due and unpaid on said agreement the sum of forty dollars and eighty cents.

There was also set out in the complaint a cause of action against the defendant John Fox, Sr., on a collateral contract, guaranteeing "the payment of said scholarship in accordance with the terms of said contract" with the son.

Separate answers were interposed, each containing certain denials alleging other defenses, and the answer of the defendant's son contains this averment: "The defendant further answering the complaint herein alleges that there is a misjoinder of parties defendant herein. That the said defendants cannot be joined in this cause of action as party defendants; that it is improper to join them as such."

The answer of the codefendant, among other matters, alleges "that there is a misjoinder of parties defendants."

At the trial the plaintiff offered in evidence the contract with the independent agreement of guaranty of Fox, Sr., indorsed thereon. Objection was interposed, setting forth among other grounds: "That part of it purports to be a direct contract with John Fox, Jr., and the other portion on another leaf is a guarantee with John Fox, father, and that this action can't be maintained jointly against these parties. On the ground that it is incompetent and can't be received in the condition the action is now in. That there is a misjoinder of parties defendant. That this alleged paper contains two contracts, one direct with one of the defendants and the other collateral with the other one. That it is not proper."

The objection was sustained, the justice remarking: "I don't think it would be competent as against both of the defendants." The plaintiff then rested and the defendant moved for a nonsuit on the ground that the plaintiff had not made a

App. Div.] Fourth Department, March, 1912.

case, "that there is an improper joinder of the defendants. That the action cannot be maintained against both defendants in one action, because one is a contract of guarantee and the other is a principal to a contract, and on the ground that the defendant is an infant under the age of twenty-one years," and the motion was granted.

We start with the basic proposition that the two several causes of action were improperly united. (*Roehr v. Liebmann*, 9 App. Div. 247; *Barton v. Speis*, 5 Hun, 60; *Brewster v. Silence*, 8 N. Y. 207; *Green v. Dunlop*, 136 App. Div. 116, 120; *Gould v. Moring*, 28 Barb. 444.)

Each cause of action was stated with sufficient explicitness and the facts alleged in the separate averments were sufficient to constitute a cause of action against the defendant to whom they were directed, so that the defendants could not properly attack the misjoinder of causes of action by demurrer, although appearing on the face of the complaint. (Code Civ. Proc. § 2939; *Gerould v. Cronk*, 85 Hun, 500; *Lapham v. Rice*, 63 Barb. 485, 498.)

The Code of Civil Procedure does not prescribe the remedy available to the defendant in a Justice's Court for a misjoinder of causes of action, and it was early held that he was not required to assert it by answer but should raise the question at the opening of the trial. (3 Waite Law & Pr. [5th ed.] 274; *Gerould v. Cronk*, *supra*.)

That rule has recently been criticized, and in a case of non-joinder of parties defendant it was held that the defect should be raised in the answer by plea in abatement. (*Amsterdam El. Light Co. v. Rayher*, 43 App. Div. 602, 604.)

I think the defect was sufficiently pointed out in the answer. Much liberality is permitted in pleading, and in the practice generally, in Justice's Court. The pleadings are frequently oral; when in writing are often prepared by the justice or a person not learned in the law or familiar with the technical rules of pleading. The purpose of the pleading is to state the facts which will apprise the adverse party of the cause of action or particular defense to be averred. The complaint had clearly alleged two several causes of action and the answer charged that there was a misjoinder of the defendants. It did not stop

Fourth Department, March, 1912.

[Vol. 149.]

with that specific averment. It further stated that they cannot be joined in this cause of action as defendants, and that joining them as such was improper. In view of the misjoinder in the complaint the plaintiff must have realized that it had erroneously united two causes of action, and the defendants were objecting to this defect in the complaint.

The contract was offered in evidence, including that of the guaranty. The objections interposed definitely informed the plaintiff of the position of the defendants. Now the contract and the collateral agreement may have been competent against Fox, Sr. It was not offered against him alone. The remark of the court that it was not "competent as against both of the defendants" was an intimation to the plaintiff that it might discontinue as to one defendant. The suggestion was not adopted and the plaintiff promptly rested. Upon a motion for nonsuit the vice in the complaint was again succinctly stated, and the plaintiff's counsel, it seems to me, should then have offered to discontinue as to one defendant. He preferred, however, to rely upon a technicality, although he had improperly united two independent causes of action. A discontinuance as to one defendant meant very small, if any, costs against the plaintiff, and the action could then have been tried upon the merits. I think the courts should not uphold attempts to gain advantage and pile up costs by technical practice, such as the plaintiff seemed to be inclined to adopt.

The judgment of the County Court should be reversed and that of the Justice's Court affirmed, with costs to the appellant in this court and the courts below.

All concurred, except MCLENNAN, P. J., who dissented in a memorandum, and KRUSE, J., who dissented upon the ground that the principal contract and the guaranty were improperly excluded.

MCLENNAN, P. J. (dissenting):

This action was brought in Justice's Court jointly against John Fox, Sr., and John Fox, Jr., upon a contract which John Fox, Jr., had duly executed and which John Fox, Sr., had guaranteed. Upon the trial before the justice, when the plaintiff offered such contract and guaranty in evidence, it was

App. Div.]

Fourth Department, March, 1912.

excluded upon the ground, apparently, that it involved separate causes of action. The defendants, or either of them, as I interpret the record, made no objection to the receipt of such contract and guaranty in evidence on the ground that the causes of action against each of such defendants were separate and distinct and could not properly be joined, but solely upon the ground that there was an improper joinder of parties defendant. The defendants were properly joined and the question of the improper joinder of causes of action not having been raised, the paper comprising the contract and guaranty should have been admitted in evidence. It was essential to the plaintiff that in the first step of the trial such paper be received. Upon its receipt it was entitled to make such claim against either of the defendants as the conditions or purport of such paper warranted. It having been excluded, of course it was not in position to recover against either of the defendants. It seems to me that the paper comprising such contract and guaranty was competent and should have been received in evidence; that it was then open to the plaintiff to determine against which of the defendants it would proceed and ask judgment, but that by the exclusion of the evidence it was prevented from asking judgment against either.

I conclude, therefore, that the County Court was right in reversing the judgment of nonsuit and in holding that the paper containing the contract and guaranty was competent.

Judgment of County Court reversed and judgment of Justice's Court affirmed, with costs in this court and County Court to appellants.

MARGARET COWELL, as Administratrix, etc., of EDWARD COWELL, Deceased, Respondent, *v.* ELIZABETH SAPERSTON, Appellant, Impleaded with JOHN J. BROWN, Defendant.

Fourth Department, March 6, 1912.

Motor vehicles — negligence — collision with pedestrian — facts justifying recovery — loan of automobile — when owner liable.

Action to recover for the death of one who having alighted from a street car and while crossing the street was struck and killed by an automobile. No horn was sounded or other signal given. Evidence exam

Fourth Department, March, 1913.

[Vol. 149.]

ined, and held, that the negligence of the driver of the automobile and the decedent's freedom from contributory negligence were properly submitted to the jury.

Although the defendant, owner of the automobile, had loaned it to a friend in order to enable him to distribute campaign literature, and although he had power to tell the defendant's chauffeur where to drive and to stop, the jury was justified in finding that the chauffeur at the time of the accident was the agent and employee of the owner, if he alone had full control of the actual management of the car and the person to whom it was loaned in nowise directed or interfered with such management.

MCLENNAN, P. J., and FOOTE, J., dissented, with memoranda.

APPEAL by the defendant, Elizabeth Saperston, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 13th day of June, 1911, upon the verdict of a jury for \$5,000, and also from an order dated the 16th day of June, 1911, and entered in said clerk's office, denying the said defendant's motion for a new trial made upon the minutes.

Clinton B. Gibbs, for the appellant.

Joseph A. Wechter and Andrew B. Gilfillan, for the respondent.

SPRING, J.:

About seven o'clock on the evening of October 20, 1910, Edward Cowell, the plaintiff's intestate, while crossing Elk street, in the city of Buffalo, was struck by an automobile owned by the appellant and received injuries from which he died within twenty-four hours. The plaintiff brought her action against the defendant and one John J. Brown, who was in the automobile at the time the collision occurred, and the jury rendered a verdict against the appellant only.

Elk street extends in an easterly and westerly direction and crosses Louisiana street at right angles. There are two street car tracks in Elk street, the northerly of which is for cars going westerly, and the northerly rail of this track is $13\frac{1}{4}$ feet from the northerly street curb. Cowell and Dailey, a fellow-workman, on the evening of the accident were going from their place of work homeward on an Elk street car

App. Div.]

Fourth Department, March, 1912.

going east. The car stopped from 125 to 150 feet west from Louisiana street and the plaintiff's intestate and his companion, with other passengers, alighted. Cowell and Dailey went around the rear of the car and started, not on a crosswalk, diagonally to a barber shop on the opposite side of the street. Cowell was ahead and when he was between the rails of the northerly track he was hit by the automobile of the appellant, which was going westerly at twenty miles an hour. No horn was sounded on the automobile or other signal given of its approach, as the evidence undisputedly shows. The automobile, as it was going westerly, was close to the curb. There was another automobile close to the curb in front of the barber shop and, as it is claimed, for the purpose of avoiding this machine the automobile of the defendant when within about forty feet of Cowell suddenly veered to the south upon the northerly car track, and so struck Cowell. There was ample space between the automobile standing in front of the barber shop and the northerly rail of the car track for the automobile to pass in safety. When the automobile which struck Cowell was within a few feet of him a man named Carberry gave a warning of the danger, but Cowell either did not hear it or did not have time in which to avoid the danger.

The questions of the negligence of the driver of the automobile and the freedom from contributory negligence of plaintiff's intestate were for the jury to determine, and there is not much claim that it went astray on either of these questions.

The interesting question is whether the negligence of Etjen, the chauffeur, is imputable to the appellant, Mrs. Saperston. The automobile was owned by her. It was an expensive Thomas seven-passenger car. Etjen was her regular chauffeur. She was a widow and the defendant Brown had been a friend of her husband, who died about two years prior to the accident. Brown was a candidate for State Senator and had used the automobile once before in conducting his campaign. He talked with Mrs. Saperston over the telephone, and gives this version of the conversation: "I called her up and told her I had some campaign literature that I wished to distribute in South Buffalo that afternoon—I believe it was the day before I called her up—and asked her if her chauffeur might take me

Fourth Department, March, 1912.[Vol. 149.]

out riding through this territory. She said she would be very glad to send him down."

Etjen, the chauffeur, testified: "Mrs. Saperston says: 'George, drive down to Mr. Brown's office; he wishes to go out campaigning, and take him wherever he wishes to go, in the afternoon. Mr. Brown is running to be State Senator, and I am lending the car to help him out.' Mrs. Saperston said I might get back before dark if I possibly could; she didn't want to leave the car out very late. She didn't fix any exact time except to say to 'get back before dark if you could.'"

Mrs. Saperston's narration of the communication with Brown is as follows: "Mr. Brown called me up on the 'phone and asked me if I would allow him to use the machine the next day, I believe. I said I was not expecting to use it and I would be very glad to send it down to him. I asked him what time, and he said about three o'clock. I ordered the chauffeur down to the Ellicott Square to Mr. Brown's office to take Mr. Brown out and use the car for a few hours. I believe that was the second time Mr. Brown had used the car. Q. Did he tell you what he wanted to use it for? A. There was no conversation as to the use of the car, but I understood Mr. Brown was running for office and it was to be used for his own purposes; that is all."

She further said: "This automobile was to be driven by Mr. Etjen wherever Mr. Brown desired to go; no limitation as to the place or time. I paid Mr. Etjen by the month. I did not take any time out for the time he spent with Mr. Brown. * * * I had employed Mr. Etjen to operate my car; that is the very purpose for which he was employed, and that was the purpose for which he went to Mr. Brown's office; that is why I sent him there to operate that car. The first time Mr. Brown asked me for the car he told me he was making a campaign for office."

She also testified the car was for her private use; "never was hired or rented out. There was nothing said about rental on this day." Etjen met Brown at Ellicott Square, saying to him: "I have been sent down by Mrs. Saperston to take you out * * * this afternoon; where do you want to go? I understand it is to distribute this campaign literature, is it here? I

App. Div.]Fourth Department, March, 1912.

said, 'No.' He said, 'Where is it?' I said, 'At the printer's.' He told me he had orders to be back at half past seven."

The defendant Brown placed the campaign literature in the car and three companions went along to aid him in its distribution. Brown told the chauffeur the points of destination in order to dispose of his campaign material. He gave no instructions as to the operation of the car, the rate of speed or the routes or streets to be taken. Etjen operated and manipulated the car without interference or suggestion from Brown or his companions and was not under the control of Brown, except that in pursuance of the directions of his employer, Mrs. Saperston, he stopped in the trip at the places requested by Brown, and that was the sum total of the suggestions made by the latter. As Etjen testified: "In the manner of operating that car that afternoon nothing was said by Mr. Brown about the speed; I was to use my own judgment. He did not indicate to me where to put on the brakes. I know when, myself."

The reason for Mrs. Saperston sending out her car was to enable Brown to disseminate literature, which, we may assume, exploited his especial and superior efficiency for the office of State Senator. She did not, however, surrender either control of her car or of her chauffeur to the aspirant for political favor. She did not permit Brown to operate the car himself, nor did she relinquish to him the dominion of her employee. He was hedged about with specific instructions which permitted him to go where Brown desired. As Etjen said: "The car was entirely in my charge in the matter of operation. I went down to Mr. Brown's office for the purpose of taking him out. That was my instruction from Mrs. Saperston."

The question of fact, and there was very little variation in the testimony bearing upon the control and authority of the chauffeur, was submitted to the jury in a careful and elaborate charge, and is summarized in this succinct statement: "Therefore, it becomes a question of fact for you to determine, under all the evidence in this case, whether the chauffeur, under the instructions already given, was, for the time being and at the time of the accident, the agent or employee of Brown or of Mrs. Saperston."

The appellant's counsel cites a number of cases illustrative of

the well-settled rule of law that before one can recover against a master for injuries sustained through the wrongdoing of his alleged servant, by virtue of the doctrine of *respondeat superior*, inevitably the relation of master and servant must be proven to exist. The crux in all these cases having any relation to the present case, so far as I have been able to find, is that the actual control and dominion over the servant was surrendered by the regular employer and taken over by the person in whose business he was engaged for the time being.

I will refer to a few of these authorities. In *Wyllie v. Palmer* (137 N. Y. 248), a leading case, the defendants, Palmer's Sons, who were manufacturers of fireworks, sold to a committee in the city of Auburn a quantity of fireworks and sent a man and a boy to assist in making the display. The relations of the parties were fixed by two letters set out in the opinion. The committee made all the arrangements for the exhibition "and the man and boy sent by the defendants acted under its directions." The boy was directed by a member of the committee to discharge rockets, and one of them went off in a horizontal direction and injured the plaintiff, who was a bystander. The court held that the contract between the parties was for the sale and delivery of goods, and that the boy immediately responsible for the injuries suffered by the plaintiff was under the control and dominion of the committee which was discharging the fireworks, and not under the authority of the sellers of the goods; and there lies the distinction between that case and the present one, for the jury have found upon evidence justifying the conclusion that the appellant did not part with her dominion over her chauffeur.

In *Higgins v. Western Union Telegraph Co.* (156 N. Y. 75) a building owned by the defendant had been damaged by fire, and a contractor was engaged in repairing and restoring it, and, among other things, was to furnish elevators, and they were then in his use and control. He needed a man to assist him in the operation of one of these elevators, and obtained from the defendant a man named Algar, who took charge of the elevator, and whose negligence was responsible for the accident. There it appeared that the contractor had control of the elevator. It was his property, and he also gave directions

App. Div.]Fourth Department, March, 1912.

and orders to Algar, which constitute the very essence of the distinction I am seeking to make.

In *Freibaum v. Brady* (143 App. Div. 220) there are some expressions in the opinion which uphold the position taken by the counsel for the appellant, but they are not necessary to the decision for the facts recited in the opinion very clearly show that the defendant was not liable. There were two brothers, each owning an automobile, which were kept by them with a garage company. The defendant lived in Long Island and the other brother at the St. Regis Hotel. Some one representing the brother at the St. Regis Hotel called up the garage company, asking for a chauffeur, who was procured, and went with the automobile of the defendant to the hotel where the brother was residing. Mrs. Brady, who was the wife of the one stopping at the hotel, took the car, and while using it an accident occurred, and the plaintiff sued James Brady, the one residing in Long Island; and the court held that he was not liable. To hold otherwise, it seems to me, would be ridiculous. While it was his car, and there was an arrangement between the two brothers by which if one machine was out of commission the other could be used by either of them, yet he did not even order out the car, knew nothing about it, but it was ordered and engaged in the business of the wife of the brother, and with the chauffeur engaged by him; so that case is not applicable.

In *Clark v. Buckmobile Co.* (107 App. Div. 120), decided by this court, a man named Birdsall, who was the general manager of the defendant, went to Syracuse on his own business, taking an automobile of the defendant, and the chauffeur was under the direction of Birdsall and engaged in his business, and this court held that the owner of the automobile was not liable for injuries sustained by the plaintiff while the car was under the control of Birdsall.

There are two other cases in this court which are cited by the appellant's counsel (*Casey v. Davis & Furber Machine Co.*, 138 App. Div. 397, and *Wolfe v. Mosler Safe Co.*, 139 id. 848), but in each of those cases the evidence showed clearly that the man was furnished by the defendant to do some particular work, and while doing it was absolutely under the control and author-

Fourth Department, March, 1912.

[Vol. 149.]

ity of the temporary employer. It perhaps is not very useful to cite authorities on this proposition because in nearly every instance the evidence discloses that there was a surrender of dominion and authority by the regular employer of the servant, and an absolute assumption and assertion of authority by the person or corporation in whose business he was engaged for the time being. There is no doubt, when that condition exists, that the regular employer is not liable.

The recent case of *Kellogg v. Church Charity Foundation* (203 N. Y. 191) is somewhat in point. In that case the defendant maintained St. John's Hospital in Brooklyn, and it owned an ambulance which collided with the plaintiff, who was riding a bicycle, and injured him, and he sought to hold the defendant liable for the injuries he sustained. It seems the ambulance was kept at a livery stable. Whenever the defendant desired to use it it notified the livery stable keeper, who for hire furnished a horse and driver for the ambulance, and that was done on this occasion, and it was the negligence of this driver which caused the injuries to the plaintiff. The driver was hired and paid by the livery stable keeper, but when he was driving the ambulance he was under the authority and control of the defendant, and yet the Court of Appeals held that the defendant was not liable; that the relation of master and servant did not exist between it and the driver of the ambulance. At the close of the opinion, at page 200, the court, as its summary of the law applicable to the situation, says (quoting in part from *Standard Oil Co. v. Anderson*, 212 U. S. 222): "Where one furnishes another with men to do work for him and places them under his exclusive control in its performance those men become *pro hac vice* the servants of him to whom they are furnished and he is responsible for their negligence because the work is his work and they are his workmen for the time being. On the other hand, where work is undertaken to be performed by the person who furnishes the workmen through servants of his selection and he retains direction and control he remains responsible for any negligence on their part in the conduct of the work. 'The simplest case, and that which was earliest decided, was where horses and a driver were furnished by a liveryman. In such cases the hirer, though he

App. Div.]

Fourth Department, March, 1912.

suggests the course of the journey and in a certain sense directs it, still does not become the master of the driver and responsible for his negligence, unless he specifically directs or brings about the negligent act."

I think the question of fact was properly determined by the jury and that the verdict should be sustained.

The judgment and order should be affirmed, with costs.

All concurred, except McLENNAN, P. J., and FOOTE, J., who dissented, each in a separate memorandum.

McLENNAN, P. J. (dissenting):

The undisputed evidence is to the effect that the defendant Saperston loaned her car and chauffeur to the defendant Brown to enable him to prosecute his individual business. The prosecution of such business was to commence at about three o'clock in the afternoon and was to continue during the afternoon and until dark. The defendant Brown accepted the car and chauffeur of Mrs. Saperston for the purpose of enabling him, as a candidate for State Senator, to promote his candidacy for such office. The defendant Mrs. Saperston's car was finally delivered to him with her chauffeur, intended to be used for the purposes of Mr. Brown, the candidate. In such delivery the instruction given to the chauffeur by the defendant Saperston was that he, the chauffeur, would take the defendant Brown on any tour which Brown might direct. Because of the direction of the defendant Brown the chauffeur went upon the street in question, and because of the chauffeur's negligent management of the car, as alleged, Mrs. Saperston is held to be liable.

My notion is that the negligence of the chauffeur was the negligence of the defendant Brown; that he, Brown, having been intrusted with the duty of indicating the route such car should take, was responsible for the method of traversing such route.

I, therefore, vote for reversal of the judgment and order.

FOOTE, J. (dissenting):

I dissent. I think the testimony of the three parties concerned quoted in full in Judge WHEELER's charge to the jury shows

that the transaction was a loaning by Mrs. Saperston of her car and chauffeur to Mr. Brown for use in Mr. Brown's business, and that while the car was so being used by Brown it was under his control legally, whether he saw fit to exercise that control or not. That both the car and the chauffeur were treated as under his actual control appears from the fact that he used the chauffeur to assist in getting the campaign literature into the car and in posting it up at different places where they stopped and that, without asking any consent of the chauffeur, Brown took three or four of his companions into the car to ride with him.

I think the verdict of the jury so far as it rests upon the proposition that Mrs. Saperston was the principal controlling the conduct of the chauffeur and not Brown, is against the weight of the evidence, and that the verdict should be set aside and a new trial ordered.

Judgment and order affirmed, with costs.

In the Matter of THE PEOPLE OF THE STATE OF NEW YORK
ex rel. CAREY CONSTRUCTION COMPANY OF ROME, N. Y.,
Respondent, v. RICHARD J. SMITH and Others, Constituting
the Common Council of the City of Rome, N. Y., and Others,
Respondents, Impleaded with HARVEY S. BEDELL and
Others, Constituting the Board of Water and Sewer Commissioners
of the City of Rome, New York, Appellants.

Fourth Department, March 6, 1912.

Municipal corporations — water works, city of Rome — claim for extra work — proper fund for payment — judgment against city — res adjudicata — collusive audit — right of taxpayer.

A judgment against the city of Rome for extra work done by a municipal contractor in constructing an extension of the water system should be paid, not from the general funds of the city, but from the municipal water fund which under the charter is a separate fund devoted to that purpose and under the control of the board of water and sewer commissioners, if said fund is adequate for payment.

On an application for a peremptory writ of mandamus to compel the board of water and sewer commissioners of said city to pay such judg-

App. Div.] Fourth Department, March, 1912.

ment, the board cannot question the relator's right to payment, as the judgment is *res adjudicata* as to the liability of the city unless set aside or vacated.

It seems, that if the audit and allowance of the claim for extra work was collusive or fraudulent, any member of said board who is a taxpayer may maintain an action to have the judgment against the city vacated.

APPEAL by the defendants, Harvey S. Bedell and others, constituting the board of water and sewer commissioners of the city of Rome, N. Y., from an order of the Supreme Court, made at the Oneida Special Term and entered in the office of the clerk of the county of Oneida on the 24th day of October, 1911, granting a peremptory writ of mandamus directing the appellants to pay a judgment recovered by the relator against the city of Rome.

Theodore E. Hancock, for the appellants.

W. E. Scripture, for the relator, respondent.

M. J. Larkin and *John E. Mason*, for city and common council, respondents.

Foote, J.:

The relator, the Carey Construction Company, as contractor, constructed a system of municipal water supply for the city of Rome under a contract with the board of water and sewer commissioners of that city. After finishing the work it presented to the board of water and sewer commissioners a claim for extras beyond the contract price of \$44,238.29. The board of water and sewer commissioners rejected and refused to allow this claim, whereupon, in accordance with the provisions of the city charter, the matter came before the board of audit, consisting of the mayor, the president of the common council, and the presidents of the five administrative boards. The board of audit on February 20, 1911, audited and allowed the claim at \$18,847.04 and by resolution directed the board of water and sewer commissioners to issue their warrant for the amount. On March 7, 1911, relator demanded a warrant for such sum from said board, which refused by formal resolution to pay the audit or any part thereof. Thereupon relator applied to the court at Special Term for a peremptory writ of mandamus

against the board of water and sewer commissioners, which application was denied on the ground, as claimed by relator, that it had an adequate remedy at law; whereupon, and on April 29, 1911, relator began an action in this court against the city of Rome to recover said sum of \$18,847.04, with interest from February 20, 1911, upon the audit of its said claim. The common council after some investigation on the subject, and after hearing the board of water and sewer commissioners in opposition to payment of the claim, adopted a resolution recommending a settlement of the action and directing the board of water and sewer commissioners to issue a warrant in favor of relator for the sum of \$18,847.04, with interest from February 20, 1911, to be paid in full settlement and discontinuance of said action. Copy of this resolution was received by the board of water and sewer commissioners on or about July 13, 1911, and on or about August 1, 1911, said board by resolution refused to comply with the resolution of the common council. No defense having been interposed by the city of Rome in said action, relator on August 3, 1911, duly recovered judgment therein against the city of Rome for \$19,379.62, being the amount of said claim as audited, with interest and costs, and said judgment was duly docketed and entered in Oneida county clerk's office on that day, and on August 16, 1911, certified copy of said judgment was filed with the city clerk of the city, together with a notice addressed to the common council of the city of Rome of the entry of said judgment in behalf of relator and demanding payment of the same. On September 18, 1911, the common council adopted a resolution denying relator's application for the payment of said judgment and refusing to pay the same, whereupon relator brought on this application for a peremptory writ of mandamus against the board of water and sewer commissioners of the city of Rome and its common council, and after hearing at Special Term the relator has been awarded the writ as against the board of water and sewer commissioners alone.

It is stated in the moving affidavits that at the time this proceeding was instituted the general city fund of the city of Rome after defraying the ordinary expenses of the city payable from that fund was more than sufficient to pay said judgment,

App. Div.] Fourth Department, March, 1912.

also that at the time the common council directed the board of water and sewer commissioners on July 12, 1911, to pay relator's claim as audited, and at the time this proceeding was begun said board of water and sewer commissioners had and have more than sufficient funds properly applicable to the payment of said sum.

Relator's application for the writ was opposed upon the affidavit of one Harvey S. Bedell, chairman of the board of water and sewer commissioners, alleging facts tending to show that the claim of relator was not a just or legal claim, that it arose out of extra work and deviations from the contract and that certain provisions of the contract and specifications were not complied with by relator in respect to having written orders for the work and in other respects not important to be noted here in our view of the case. They are facts, however, which might have afforded the city of Rome a legal defense to relator's action had such defense been interposed. Mr. Bedell does not deny the statement in the moving affidavits that the board has funds sufficient to pay relator's judgment which may be properly so applied, but he does say that at the time the proceeding was instituted the board did not have and does not have funds enough arising from water bonds or from the sale thereof to pay said judgment, but that there is more than enough of the general city funds to pay the same, and, "upon information and belief, that said city of Rome has sufficient property not devoted to public use which may be taken and sold to satisfy said judgment." An affidavit of Mr. McMaster, the city clerk, was also presented in opposition, which states that on October 1, 1911, there was a balance in the general city fund of \$47,383.50; that the same consists of taxes levied and collected upon the taxable property of the entire city of Rome, including property both inside and outside the corporation tax district; that on the same date there was on hand to the credit of the water fund of the city the sum of \$18,690.96, being the amount of the revenues of the water department and the sums remaining unexpended from the proceeds of bonds issued for defraying the cost of constructing the water supply system; that the revenues to be collected during

the month of October, 1911, will amount to from \$15,000 to \$18,000; that the board of water and sewer commissioners has the right to issue \$10,000 of unissued bonds which the common council has authorized to be issued.

By the charter of the city of Rome (Laws of 1904, chap. 650, and amendments) the board of water and sewer commissioners is a separate department of the city government, having charge of its water supply and sewer system. It has authority to enter into contracts in the name of the city for the extension and improvement of these systems, and all moneys received by the board from bond issues or receipts from water service are kept by the city treasurer separately to the credit of the water fund, he being also treasurer of this board, and he is to pay out from this fund only on orders or warrants of the board. The charter requires the board to pay out of this fund for constructing the additional water system which was constructed by relator. By section 60 of the charter it is provided that the mayor, president of the common council and the presidents of the five administrative boards shall constitute the board of audit. The common council and each board are authorized to audit claims arising in their respective departments and to order paid such as, in their judgment, are correct; but as to all claims which are disputed, they shall be referred to the board of audit, a disputed claim being one to which objection to payment is made by at least two members of the common council or of any administrative board. When so referred to the board of audit, it is required to examine into the disputed claim and report the result of its examination, with its recommendation, in cases of claims originating in the common council, to that body, and in other cases to the board from which the claims originated. The charter provides, after such report, as follows: "And the said common council or board, as the case may be, shall, in case the claim was allowed by said board of audit, pay the same at the amount allowed by said board, or in case such claim was rejected by said board of audit, shall refuse payment thereof."

It will thus be seen that relator's claim has been legally established both by audit in the form provided by the city charter and by the judgment recovered against the city

App. Div.] Fourth Department, March, 1912.

thereon. This claim is, according to the charter, properly payable from the fund provided for the construction of the water works system, which is the separate fund in the control of the board of water and sewer commissioners. That fund is adequate for its payment. No specific property of the city is pointed out from which this judgment can be collected by execution. The general statement that the city has property not devoted to public use is too vague to justify the assumption that relator has an adequate remedy by execution. The judgment should not be paid from the general fund of the city, because that fund is the property of the city at large, whereas the system of water works is by express provision of the charter to be paid for from funds of the corporation tax district, being the built-up portion of the city for the benefit of which the system was installed. It is not competent for the board of water and sewer commissioners to question in this proceeding the right of the relator to the payment of its claim; that right is conclusively established by the judgment, until it is in some manner set aside or vacated. If the audit and allowance of this claim was collusive and fraudulent, as claimed by this board, it is probably within the power of any member of the board who is a taxpayer to maintain an action as provided by statute to have this judgment vacated. Until that is done, the courts in all proper proceedings for its collection and enforcement must assume that the judgment conclusively determines the legal rights of the relator in respect to its claim.

We conclude that the order appealed from must be affirmed, with costs.

All concurred.

Order affirmed, with costs.

FRANK CIMMER, Appellant, *v.* MONTGOMERY BROTHERS AND COMPANY, Respondent.

Fourth Department, March 6, 1912.

Master and servant — negligence — injury to servant piling lumber — obvious risk — contributory negligence.

A plaintiff employed to pile lumber who while endeavoring to reach a platform laid hold of projecting boards on the top of the pile, which he could see were not held in place by the weight of other lumber, cannot recover for injuries received when the boards tipped up allowing him to fall, for he was guilty of contributory negligence.

It is immaterial that the plaintiff was not told to be careful as the danger was obvious.

SPRING, J., dissented, with opinion.

APPEAL by the plaintiff, Frank Cimmer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 15th day of April, 1911, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 15th day of May, 1911, denying the plaintiff's motion for a new trial made upon the minutes.

M. W. Casey, for the appellant.

Clinton B. Gibbs, for the respondent.

KRUSE, J.:

The plaintiff worked for the defendant in a lumber yard. He fell from a lumber pile and was hurt. He seeks to hold the defendant liable for his injuries. At the close of all the evidence a verdict was directed for the defendant, and plaintiff appeals.

Three men were engaged in piling lumber, consisting of inch boards, four inches wide and from fourteen to eighteen feet long. One man was on top of the pile, another, the plaintiff, stood on a temporary platform at the face of the pile, and the other was on the ground. The man on the ground handed the boards to the plaintiff, who in turn passed them to the man on top of the pile. Two of these boards were laid side by side, crossways of the pile, every eighteen inches or two feet as the

piling progressed upwards, with the ends projecting about eighteen inches beyond the side of the pile on the south side, serving as means for the men to get on top of the pile.

On the morning of the accident the three men were thus at work. It came half-past nine o'clock. The whistle blew and they stopped their work. It was customary to stop five minutes, at this hour, for lunch. After lunch the plaintiff asked the foreman or assistant superintendent where he should work. He was told to go up on the pile and work on the scaffold, as before. The lumber was piled in courses, each course consisting of a tier of twelve boards (some of the witnesses say six boards), one on top of the other, the tiers laid side by side on three crosspieces or boards, one at the face of the pile, another at the middle and another near the end, laid across the width of the pile. The top tier had been commenced but not finished. Two stepping boards had been laid crossways of the pile on top, but nothing had been laid on them to hold them down, as plaintiff states, save one tier of twelve boards on the south side of the pile, where the stepping boards projected. The plaintiff used the projecting stepping boards to get to the top of the pile, intending to drop down from the pile onto the scaffold, as he had done before. When he reached the second stepping boards from the top, he put his hand on the end of the projecting boards on top of the pile, raised one foot, put it on the top boards also, and was raising up the second foot, as he says, when the top boards tipped up and he fell a distance of about twenty three or twenty-four feet, and was hurt.

Plaintiff says that he was not told to be careful and did not know that there was but one tier of boards on top of these projecting boards; but that was plainly to be seen before he took hold of, or stepped on them. The condition was so obvious that he should have known it, and the danger so apparent that he is chargeable, as it seems to me, with knowing and appreciating the danger of attempting to rest his weight on the end of the boards, and I think in so doing he was himself at fault.

I do not see how the defendant can be held liable for negligence, either at common law or under the Employers' Liability Act. If there was any carelessness upon the part of the man

Fourth Department, March, 1912.

[Vol. 1]

on top of the pile (and I do not think there was), it was the negligence of a fellow-servant; and as regards the matter of warning, even if the foreman knew of the condition of the top of the pile and of the looseness of the stepping boards, it would hardly seem that it was necessary to call special attention to what would be so perfectly apparent to any one in going up the pile. As the law now stands, I am unable to see that the defendant is liable in any view of the evidence.

I think the case was correctly disposed of by directing a verdict for the defendant, and that the judgment entered thereon should be affirmed.

All concurred, except SPRING, J., who dissented in opinion.

SPRING, J. (dissenting):

The action is negligence by an employee against his employer, a domestic corporation, owning a lumber yard in the city of Buffalo, and a recovery is sought in pursuance of the provisions of the Employers' Liability Act (Laws of 1909, chap. 600), of the Labor Law (Consol. Laws, chap. 31 [Laws of 1909, chap. 36], art. 14), and the common law as well.

The plaintiff had been in the service of the defendant in the lumber yard since the 1st day of June, 1909, and was assisting in piling lumber in the forenoon of the seventeenth of that month. The pile, by the north side of which he was at work, was up nearly twenty-five feet and something like sixteen twenty feet each way across. The plaintiff was on a temporary scaffold and the boards were delivered to him from a truck and he handed them to Kijanka, who was on top of the pile and who piled them as they were handed up to him. The boards were from fourteen to eighteen feet in length, four inches wide and one inch thick, and Kijanka commenced piling at one side of the pile, placing twelve boards on top of each other and then another similar tier alongside until he extended these tiers entirely across the pile. On top of each course of twelve boards crosspieces were placed. As the pile went up Kijanka extended out of the southerly side of the pile about eighteen inches, two of the boards laid side by side forming steps, and the long ends of these boards reached into the pile.

App. Div.]

Fourth Department, March, 1912.

ten or twelve feet and were held in place and from tipping by the tiers of boards as they were piled, and this stairway construction continued until the time of the accident. These sets of projecting boards were intended for steps, and were about eighteen inches apart, and the only means of access to the top of the pile or to the scaffold on which the plaintiff was at work at the time he was injured.

On the morning of the seventeenth the plaintiff was directed by Newman, the superintendent of the defendant, to go up this stairway at the south side of the pile and hand the boards from the scaffold to Kijanka. He did so, and the steps were firm and adequate, and when he reached the upper step the pile was level, and the boards of the lumber pile held the top step boards from tipping down. He continued handing up the boards to Kijanka until about nine-thirty o'clock in the forenoon, and the top of the pile was then seven or eight feet above the scaffold on which he was working. The workmen then suspended work for five minutes for luncheon, the plaintiff letting himself down to the truck. Kijanka had started piling boards across the southerly side of the pile, and had one tier of twelve boards, and three or four boards by the side of it for the second tier. Before commencing these tiers he had extended two boards out for about eighteen inches for another step in the series. These boards extended well across the pile and there were no boards to hold them, except the tiers immediately adjacent to them, and any substantial weight on this upper step would inevitably cause it to fall, and would necessarily tip over the boards laid along on top of them. Kijanka testified that he knew the top step was not safe to use, as the boards composing it were not held down, but he further stated that he had warned the plaintiff of the danger, which the latter explicitly denied. The plaintiff did not assist in laying the boards in place on the pile, and was not familiar with the manner in which the work was done. His work, in so far as it related to the lumber pile, was to hand up the boards. He was a common laborer and did not speak English. Kijanka went down these steps for his luncheon, and up again after finishing it. The plaintiff afterwards went up the steps. The foreman was near him. The plaintiff testified: "Newman

Fourth Department, March, 1912.

[Vol. 149]

was standing and looking all the time at the pile. Newman saw me going up this pile. He was walking from one side of the machine to the other and looking at the pile." As plaintiff reached the top he put one foot on the upper step and with his right hand on the boards, attempted to make the last climb, when the boards of the step tipped down by his weight and the tiers of boards as well, and all were precipitated to the ground twenty-five feet below, and the plaintiff suffered very serious injuries.

Before the day of the accident he had never climbed steps like these by the side of the lumber pile. On previous days he made the ascent on boards placed in the space separating two contiguous piles and the steps were firmly held in position by the boards of the two piles into which they were extended. He testified that he was not advised of the danger of stepping on the top step, nor of the fact that the tiers of boards on top of the pile did not extend across it, nor that there was no weight to hold down the steps in order to prevent them from falling. He assumed, as he had a right to do, that they were safe for him to ascend. He was obeying the direction of the foreman who was in close proximity to him when he was climbing up the stairway, which at best made a precarious means of ascent, and close attention on his part was required as there was no railing on the outer side of the steps.

The defendant provided the way for the plaintiff to reach his place of work and the duty was imposed upon it to make this means of access reasonably safe, and the obligation was not one it could delegate to Kijanka. Whoever made the way of approach represented the defendant, if made by its authority or with its knowledge of the purpose for which it was to be used, as the proof shows in this case.

Within the scope of the Employers' Liability Act this approach was a part of the place provided for him to carry on his work. In *Kirby v. Montgomery Brothers & Co.* (197 N. Y. 27) the court, in commenting on a walk which the defendant had provided for its workmen and which proved to be inadequate, used this language (at p. 31): "Acting in the line of his duty, the plaintiff was walking from one part of the building to another over a walk provided by the defend-

App. Div.]

Fourth Department, March, 1912.

ant for that purpose, and under these circumstances the law regards the walk as a place furnished by the defendant for his servants to work in. If the jury could have found that the walk was unsafe and that the defendant knew or should have known it, the plaintiff had a right to recover damages for the injuries he sustained, provided he was not himself guilty of negligence."

In *Nappa v. Erie Railroad Company* (195 N. Y. 176) the court (at p. 182) cites approvingly the following definition of "way" as used in the English Employers' Liability Act, and as given in *Willetts v. Watt & Company* (L. R. [1892] 2 Q. B. Div. 92, 98): "The course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a 'way' within the meaning of the statute."

The counsel for the defendant cites many authorities to the effect that the employer is not liable where the defective condition causing the injuries was due to the manner in which the work was prosecuted. (*Citrone v. O'Rourke Engineering Construction Co.*, 188 N. Y. 329; *Stourbridge v. Brooklyn City R. R. Co.*, 9 App. Div. 129; *O'Connell v. Clark*, 22 id. 466.) These authorities proceed primarily upon the ground that the plaintiff is, in a measure, responsible for the constant progress of the work and the danger grows out of its performance in its normal advance and development. He knows the dangerous condition and contributes to, or is connected with it; and the constant changing in the place brings about the unsafe condition. In other words, the employee assumes the risk of an obviously dangerous condition, and that is the gist of the rule exonerating the employer. The way here constructed was not within the view of the plaintiff and he had no part in its making. It was an independent method provided for a special purpose and was not the necessary result of the progress of the lumber piling. A ladder might have been provided or other means adopted of reaching the top of the pile or scaffold. The piling of the lumber in and of itself did not make the stairway. In excavating a tunnel, or in blasting

Fourth Department, March, 1912.

[Vol. 149]

in a quarry, the place where the men are at work invariably changes as the work progresses, and the changes are made by the men in the ordinary prosecution of their employment.

I doubt, therefore, whether within the doctrine of the common law the obligation imposed upon the defendant to provide a reasonably safe place for the plaintiff is abrogated by the exception or limitation relieving the master of liability where the place is the natural result of the pursuit of the work in which the servant is engaged.

Passing that, the Employers' Liability Act has effected a radical modification of the rule of the common law adverted to, and the courts of this State in disposing of actions brought under the common law since this enactment are careful to note the change. (*Henry v. Hudson & Manhattan R. R. Co.*, 201 N. Y. 140, 142; *Mullin v. Genesee Co. El. L., P. & G. Co.*, 202 id. 275, 276 *et seq.*)

Within the provisions of that act the employer is made liable to his employee for injury caused by any defect in the "condition of the ways, works or machinery" connected with or used in the business of the employer and attributable to his negligence or to the negligence of any one in his employ and intrusted by him with the duty of seeing that the ways etc., were in proper condition. Kijanka erected the pile and made the stairway under the personal direction and within the oversight of Newman, the defendant's superintendent in immediate charge of the work. The defendant is responsible for the access which was provided for the plaintiff to reach the work assigned him to perform, and this was a "way" within the meaning of the statute. If this was constructed as the work progressed the defendant is not relieved on that account for it was the way furnished during the performance of that particular work. It was not even a temporary appliance or way for it was to continue at least as long as the making of that pile of lumber continued. The length of time which a way exists is not necessarily to determine its character. One kind of work may require years in its performance, and another a week, and yet the same rules may be applicable in determining the liability of the employer to his workmen.

App. Div.] Fourth Department, March, 1912.

The plaintiff was not guilty of contributory negligence as matter of law. In his passage over the steps two hours earlier at the command of Newman he had found them secure. At the time of the accident he was ascending in the presence of the superintendent and following Kijanka, who had made the steps and who, we may assume, was competent for that purpose. The projection of one and one-half feet made a narrow space for a stocky man, as the plaintiff was; and the rise of one and one-half feet for each step called for caution in observing and measuring his course upward. He looked ahead of him, not realizing that the top step was a veritable danger trap. To be sure, he did not look upon the pile over the tier of boards next to him. He had received no warning that the top step was unsafe to step on. He was cautiously pursuing the course which he deemed proper in order to prevent him from falling twenty or twenty-five feet to the ground because of the perils which were obvious and they absorbed his attention. Negligence cannot, therefore, be imputed to him as matter of law merely because he did not look over the top of the pile when he had no reason to apprehend that the steps were not securely fastened. Had he looked on the pile he might not have been apprised of the fact that the boards comprising the top step were not held in place for he did not know how these steps were constructed or held in place. His conduct in the light of the circumstances disclosed, and also the question of assumption of risk, were for the jury to determine. (*Clark v. N. Y. C. & H. R. R. Co.*, 191 N. Y. 416, 420; *Knezevich v. Bush Terminal Co.*, 127 App. Div. 54.)

I think the case should have been submitted to the jury.

Judgment and order affirmed, with costs.

MORRIS MILLER, Respondent, *v.* THE BUFFALO AND LAKE ERIE TRACTION COMPANY, Appellant.

Fourth Department, March 6, 1912.

Railroad — negligence — rear-end collision between trolley car and vehicle — negligence and contributory negligence, when question for jury.

Action against a railroad company to recover for personal injuries. The plaintiff while driving a wagon at night, on leaving a city and reaching a macadam road which was in bad condition, drove with his wagon wheels between the tracks of the defendant's trolley line, that portion being paved with brick. He testified that he looked back every minute or two and could have seen a car for nearly half a mile, but did not discover one. The defendant's car, without sounding a bell or giving other warning, ran into the plaintiff's wagon from behind at such speed as to kill the horse and injure the plaintiff, the motorman being unable to stop the car until it had proceeded over 100 feet beyond the point of collision. Held, that the negligence of the defendant and the contributory negligence of the plaintiff were questions for the jury, and that a judgment for the plaintiff should be affirmed.

A person driving upon a street car track who was struck by a car coming from behind at an excessive rate of speed and without warning, cannot be held guilty of contributory negligence as a matter of law because he did not look back oftener than once in every two or three minutes.

It is immaterial that the defendant's motorman claimed to have sounded the gong immediately before the collision, as such warning was not timely and gave no chance for the plaintiff to leave the track.

APPEAL by the defendant, The Buffalo and Lake Erie Traction Company, from an order of the County Court of Chautauqua county, entered in the office of the clerk of said county on the 27th day of September, 1911, affirming a judgment of the Municipal Court of the city of Dunkirk in favor of the plaintiff rendered on the 18th day of April, 1911, for \$537.65, and also from a judgment of said County Court entered on the 27th day of September, 1911, upon said order of affirmance.

Charles F. Blair, for the appellant.

Nelson J. Palmer, for the respondent.

KRUSE, J.:

The plaintiff was driving a horse and wagon on Central avenue in the city of Dunkirk. A car came from behind and

App. Div.] Fourth Department, March, 1912.

a collision occurred, without fault upon the part of the plaintiff, as he claims, and through the carelessness of the defendant's motorman.

The collision occurred on the night of November 25, 1910, at about ten o'clock. The plaintiff was a junk peddler. He had several bags of junk in his wagon. He had one horse and was sitting in the front of the wagon driving. He drove on the side of the street, between the track and the curb, until he came to where the macadam was in bad condition, which was not until after he had reached the Dunkirk city line. The street between the curb and the railroad tracks was muddy, stony and rutty, so he drove with his right wheels between the two rails of the track, where it was paved with brick. While it was at night, there were electric lights along Central avenue, and streets intersected the avenue. His horse was jogging along, as he says, about five or six miles an hour. As he was driving along he claims that he looked back every minute or two. A car could be seen for nearly a half a mile, but he did not discover the car. The car was lighted, but it is not very clear just how much. No bell was rung or other warning given, and the motorman did not discover the plaintiff and his rig upon the track in time to avoid the collision.

The car was going at the rate of fifteen or twenty miles an hour, as one of the witnesses says, and others say it was going but eight to ten miles an hour. How fast it was going in the open country, beyond the city line, may to some extent be inferred, if the plaintiff is truthful in stating that he looked around as often as every minute or two, and did not see the car, which could be seen for a half a mile. However, when the car struck the plaintiff it was going enough faster than he was driving to break the wagon, kill the horse, hurt the plaintiff and go some distance beyond the point of the collision, one of the witnesses says 100 to 150 feet, before it was stopped.

There does not seem to be much doubt about the carelessness of the motorman, at least the jury was warranted in so finding. It is, however, contended that the plaintiff was guilty of contributory negligence as a matter of law. It would seem that that question was also one for the jury. But it is said that this court has decided otherwise upon similar facts in

the case of *Geleta v. Buffalo & Niagara Falls Railway* (88 App. Div. 372; affd., 181 N. Y. 524). There the injured plaintiff was driving along a highway in the open country, between Buffalo and Tonawanda. The road was in good condition between the curb and the track, and there was no necessity for his driving upon the track. It was dark; there were no street lights; it was snowing; the track was slippery, and perhaps he should have anticipated that the motorman might not be able to see him in time to avoid a collision. He looked around only once in two minutes. In that respect the case seems to be like this. But I am not aware that it has ever been held that a person driving upon a street car track in a city is guilty of contributory negligence as a matter of law if he does not happen to look back for an approaching car oftener than once in every two minutes and is struck by a car going at an excessive rate of speed, without giving him any previous warning at all. It is expected that a motorman will have his car under control at street intersections, and even in the block go at a reasonably safe rate of speed, and give timely warning to persons who may happen to be on the track ahead of him. A person so driving upon the track has a right to rely, at least to some extent, that ordinarily a motorman does not run him down without giving him some warning. Of course, if the person so driving upon the track is himself careless, he is precluded from recovering for his injuries, even in such a case, if his carelessness contributes to the result.

It should be stated in this connection that the motorman claims that as soon as he discovered the plaintiff he put on the brakes and sounded the gong, and that is all he had time to do before the collision. But unless the warning was given in time it, of course, would do no good; and it is very evident that it was not, because it could hardly be expected, even if the plaintiff had heard it, that he could get off the track in time to avoid the collision if the motorman, knowing that a collision was imminent, could not stop his car in time.

I think the judgment and order should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

CLARENCE L. RIPPLEY, Appellant, *v.* FREDERICK FRAZER,
Respondent.

Fourth Department, March 6, 1912.

Negligence — injury to electrician repairing elevator — contributory negligence — trial — inadvertent discharge of jury — direction to jury to retire after discharge — when no mistrial.

Action to recover for personal injuries. The plaintiff, an electrician, sent to repair electric lights on a passenger elevator, while seated on the top of the car was crushed against the top of the shaft when the car ascended to the top floor. He had previously examined the situation and knew of the danger, having requested the operator of the elevator not to go above the sixth floor which he had promised not to do. It appeared that the plaintiff could just as well have stepped from the elevator before it started and that he could do no work while it was running. On all the evidence,

Held, that the jury were justified in finding the plaintiff guilty of contributory negligence.

The trial court submitted to the jury the question of the defendant's negligence and the contributory negligence of the plaintiff and the amount of damages as three specific questions of fact, stating that they need not answer as to damages should they find in the defendant's favor on either of the two first questions. During their deliberations the jury found the defendant negligent and the plaintiff guilty of contributory negligence but could not agree on the question of damages. On the following day the foreman informed the court that the jury had not agreed upon a verdict, had answered the first two questions but not the last one, whereupon the court believing that the first questions had been decided in favor of the plaintiff, discharged the jury, but upon learning immediately that they had found the plaintiff guilty of contributory negligence and the defendant negligent, he directed the jury to again retire and bring in their verdict on the first two questions which they did, the court thereupon directing a judgment for the defendant.

Held, that the action of the court in directing the jury to retire was proper under the circumstances and that there had been no mistrial.

APPEAL by the plaintiff, Clarence L. Ripley, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 15th day of March, 1911, upon the dismissal of the complaint by direction of the court after a trial at the Onondaga Trial Term, certain questions of fact having been submitted to the jury, and also from an order entered in said clerk's office on

Fourth Department, March, 1912.[Vol. 149.]

the same day denying the plaintiff's motion for a new trial made upon the minutes.

J. David Enright, for the appellant.

Clifford H. Searl, for the respondent.

KRUSE, J.:

The plaintiff, a electrician, was sent by his employer to repair the electric lights in the defendant's apartment house, in which there was an elevator. The elevator was lighted by a lamp connected with an electric cable, which extended from a fuse box at the fourth floor and entered the elevator at the top, where a break was discovered. The plaintiff sat on top of the elevator, repairing the cable. He knew that if the elevator went to the seventh floor he would be squeezed between the top of the elevator and the ceiling of the elevator shaft. He had looked over the situation there and had called the elevator boy's attention to it, as he says. He told the elevator boy not to run above the sixth floor and the elevator boy promised not to do so. But the boy forgot and ran to the seventh floor, to take a lady passenger there, and plaintiff was hurt. He says the elevator boy was careless, and so the jury found, and probably without difficulty; but the jury also found that the plaintiff himself was lacking in care and caution.

The plaintiff could just as well have stepped from the elevator before it started. He could not work while it was running. The top of the elevator was opposite or near the floor above the one where the passenger entered, and all that he would have had to do was to open the door and step out. He chose to remain. He also knew, if he was observing, that after the boy passed the sixth floor he would probably go to the seventh. He knew he had a passenger. But he says that he paid no attention to whether the boy was following instructions not to go beyond the sixth floor, and he did not know at what floor they were until he was struck.

It is unnecessary to refer to other circumstances, either for or against the claim of contributory negligence. The trial court submitted that question with the others to the jury, in a charge that was apparently satisfactory to the plaintiff, and I

App. Div.]

Fourth Department, March, 1912.

think the jury was warranted in finding that the plaintiff himself was not free from contributory negligence.

I have given a mere outline of the evidence. There is, however, another question in the case which requires further attention. The presiding judge told the jury that he would not ask them to render a general verdict, but to answer specific questions in writing. He submitted three questions: (1) Was the defendant guilty of negligence which caused the accident? (2) Was the plaintiff guilty of contributory negligence? (3) What damages were caused to plaintiff by the accident complained of? stating that they need not answer the last question if they should find either that the accident was not occasioned by the elevator boy's negligence or that it was occasioned in whole or in part by the plaintiff's negligence. But the jury evidently misapprehended, or forgot that it was unnecessary to answer the last question, in the event that they found against the plaintiff upon either of the others. Instructions had been given to the officer in charge of the jury that if they did not agree by a certain time in the course of the evening to discharge the jury. The jury had agreed among themselves that the elevator boy was negligent, and also that the plaintiff himself was guilty of contributory negligence, but had not agreed upon the third question, as they thought necessary to do. The officer was informed that they had not agreed and thereupon, at the appointed time, the jury was permitted to go. The next morning, at the opening of court, they were called, and the record shows the following proceedings: "Clerk of the Court: Gentlemen of the jury, have you agreed on a verdict and answered the questions submitted to you by the court? Foreman of the jury: We have not. We have answered the first two questions and not the last one. The Court: Not the last one? Foreman of the jury: No, sir. The Court: Jury discharged."

In this connection it should be stated that immediately after the court had discharged the jury the foreman stepped up to the judge and asked to be excused from service for the afternoon, which was granted. He then asked whether, if the jury had found in favor of the defendant on either one of the first

Fourth Department, March, 1912.

[Vol. 149.]

two questions, it was necessary for the jury to decide the third, to which the judge replied: "Did you do that?" and immediately directed the jury to return to the jury box. Then occurred the following: "Clerk of the Court: Gentlemen, please take your seats again. The Court: I think I had better examine that verdict. Gentlemen, I think I will take your verdict and see what it is. Foreman of the jury: We didn't seal the verdict because we didn't finish it. That is they agreed so far and didn't finish the last question. The Court: Gentlemen, you may retire and bring in a verdict on the two questions upon which you did agree. (Jury retired.)" The jury returned with a verdict in writing, answering both questions in the affirmative, and thereupon the judge directed judgment in favor of the defendant.

It is unnecessary to follow through the colloquy between the court and counsel for the respective parties, after the jury retired, or to state in detail the contents of the affidavits of the jurors and others, relating to what occurred in and out of the jury room. It is sufficient to say that it very clearly appears that the jury had agreed upon the verdict which they finally rendered before they were discharged by the officer the evening before, and the reason they did not then reduce to writing and seal their verdict was because of the misapprehension to which I have called attention. And it is also very clear that between the time they were permitted to go by the officer and returned to the jury box in the morning nothing occurred which in any way could have influenced them in their final report, even if they had not agreed until their final meeting in the morning. The trial judge states that in discharging the jury it was not a mere slip of the tongue, but was his deliberate act, believing that in view of his charge the jury had answered the first two questions in favor of the plaintiff and had been unable to agree on the amount of the verdict. And from the colloquy and the position taken by the respective counsel during the colloquy, it is evident that they also believed that the jury had found for the plaintiff, even up to the time when they were sent back, although the judge, evidently, suspected from the interview with the foreman (which, I assume, counsel did not hear) that his belief was not well founded. The judge saw

App. Div.] Fourth Department, March, 1912.

to it, however, that each counsel was amply protected by proper exceptions, so as to enable either to attack the verdict, which plaintiff's counsel did as soon as the verdict was rendered, contending that the court had no power to direct a jury to again retire, after they had separated and after he had discharged them, and that a mistrial had resulted. The judge, after carefully considering the question (*Rippley v. Frazer*, 69 Misc. Rep. 415), denied the motion for a new trial, and the plaintiff appeals from that order and from the judgment entered thereon.

I think the trial judge was clearly right in sending the jury back and in receiving their verdict. While the judge had publicly announced the discharge of the jury, he almost instantly thereafter recalled that announcement and sent the jury back to report their verdict. Even where a jury have agreed upon a verdict, reduced it to writing and sealed it, and they have separated but not been finally discharged from the case, the jury has been permitted to again retire, consider the case and bring in a verdict for a larger amount than that stated in the sealed verdict. (*Warner v. N. Y. C. R. R. Co.*, 52 N. Y. 437.) But here the jury had already agreed upon the questions which they finally reported, although it had not been announced. All that was left to do was to reduce to writing the special verdict, as the Code requires (Code Civ. Proc. § 1187), and that was a mere clerical act. Courts have gone even farther than here, in obtaining, perfecting and saving the verdict of a jury, after they have separated, where through inadvertence or mistake the result of their deliberations has not been correctly reported or recorded. (*Wirt v. Reid*, 138 App. Div. 760, and cases there cited.)

I think the judgment and order should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

In the Matter of the Judicial Settlement of the Accounts of
JOHN G. MYHILL, as Executor and Trustee of the Last Will
and Testament of GEORGE OVER, Deceased.

IDA MYHILL and Others, Appellants; FREDERICK W. SKITTLE-
THORPE and WALTER CHARLES SKITTLETHORPE, Respondents.

Fourth Department, March 6, 1912.

Will construed — gift of residuary estate to designated legatees and
children — when legatee and children take collectively.

A testator having given a life use of all his property to his widow directed that, at her death, the residue should be "equally divided between" certain persons named "and my niece" S. "and her six children now living." It was further provided that should any of the above-named legatees die prior to the testator and his wife the property should be equally divided among the living legatees. At the time the will was executed and at the death of the testator S. had eight children living instead of six. One of the residuary legatees named died after the testator but before the death of his widow.

Held, that the testator intended to divide his residuary estate into as many parts as there were designated legatees living at the death of his widow and that S. and her children were only entitled to one share collectively.

ROBSON and FOOTE, JJ., dissented.

APPEAL by Ida Myhill and others from a decree of the Surrogate's Court of the county of Orleans, entered in said Surrogate's Court on the 7th day of August, 1911, upon the judicial settlement of the accounts of John G. Myhill.

S. E. Filkins, for the appellant.

Albert C. Burrows, for the respondents.

Ramsdale & Church, for John G. Myhill, as executor, etc.

KRUSE, J.:

The disposing part of the last will and testament of George Over, late of the town of Gaines, Orleans county, is as follows:

"First: After all my lawful debts are paid and discharged, I give, and bequeath to my wife, Augusta Over (provided she should survive me) the use of all my property, both real and personal. Should the income from said property be insufficient for her support she is privileged to dispose of any portion

App. Div.]

Fourth Department, March, 1912.

thereof. At her death I direct that the residue of said property *be equally divided* between Mrs. Ida Myhill and Mrs. Addie Parker both of Millville, N. Y., Mrs. Jessie Smith, who is a daughter of my wife, Mrs. Mary Tills, of Gaines, N. Y., *and* my niece Mrs. Mary Jane Kittlethorpe and her six children now living and who reside in Southampton, England.

"Should any of the *above named* legatees die previous to the death of myself and wife the said property shall be *equally divided* between the legatees who are living. Should any of the above named legatees dispute this my last will and testament, they shall be debarred from any portion of said property."

The italics are mine and the punctuation in that part of the disposing clause which relates to the disposition of the residue of the estate is precisely as above.

Mary Tills, named in the will, died after the testator but before the death of his widow. It is not claimed that she has any interest in the estate.

Mary Jane Kittlethorpe, or Skittlethorpe, which is her correct name, had eight children instead of six, living at the time the will was made and at the time of the death of the testator.

The question is whether the residuary estate shall be divided into four parts, giving to Mrs. Skittlethorpe and her children one share and to the other three legatees named one share each, or, as the surrogate held, into twelve parts, giving an equal share to each of the beneficiaries, including the children.

Ida Myhill and Addie Parker are sisters and are nieces of the testator's widow. Jessie Smith is the daughter of the testator's widow, as the will states. Mary Tills, who is dead, was not related to the testator in any way, so far as the record discloses. Besides Mrs. Skittlethorpe and her children the testator left as next of kin, three children of a deceased brother, residing in the State of Minnesota, three children of a deceased nephew and a child of a deceased sister of the testator, who resided in the United States, but at what particular place is not stated.

It appears that the testator had lived at Gaines for about twenty years immediately before his death. It does not appear that he left anything but personal property, amounting to

Fourth Department, March, 1912.

[Vol 149]

about \$8,000. There is nothing to show the personal relation of the several legatees or any of his next of kin to the testator or their needs or any other circumstances which throw any light upon the question as to whether one or more of the legatees would be more likely to be the object of his bounty than the others. The only facts and circumstances appearing in the record, aside from what is contained in the will itself, are those to which I have called attention. Why he should have left out the Minnesota nieces and his other blood relations living in this country and included a niece and her children in England, is a mere matter of conjecture. Presumably, it was that they were in need, or more entitled to his bounty than the others. Nor is there anything to indicate why he should name the relatives of his wife as legatees, unless it is for the same reason. It does not appear who drew the will, whether he himself or some one else. While Mrs. Skittlethorpe and her children were blood relatives of the testator, it would seem that his relations with them could not have been very close or intimate. He apparently did not know the number of children and her name is not quite correctly stated, although that may have been a mere inadvertence or mistake of the scrivener.

If the testator had in mind Mrs. Skittlethorpe and her children individually, and not collectively, it would be natural for him to ascertain the number of her children; because in that view the number of children would not only affect what the children and their mother would receive, but as well the amount that would go to each of the other legatees. Of course it may be that the testator made his will without considering how much each person would receive under it; but the other view, under the circumstances, seems more reasonable, and is borne out, as it seems to me, by the use of the conjunction "and" before the words "my niece Mrs. Mary Jane Kittlethorpe and her six children," which groups the niece and her children together. While the rules of punctuation and grammatical construction should not be controlling in construing this will, I think it would be more natural to omit the word "and" there, if it was the intention of the testator that the niece alone should have the same share as the other legatees specifically named, and not she and her children take as one.

App. Div.] Fourth Department, March, 1912.

Of course there may easily be a difference of opinion as to the effect to be given to the word "and" in this connection, and perhaps it is not at all important in determining which construction shall be given to the language used.

I think the testator intended to divide his estate into as many parts as there were legatees designated by name, giving to Mary Jane Skittlethorpe and her children one share collectively, and to each of the other legatees named another share. That construction is more reasonable and natural, as it seems to me, than that he intended to divide his estate into as many parts as there were beneficiaries without naming them or knowing how many there were.

I think the decree should be modified by directing a division of the net proceeds into four parts, distributing one part to Mary Jane Skittlethorpe and her children, and to the other three legatees one part each, with costs to each of the parties appearing on this appeal by separate attorneys, payable out of the estate.

All concurred, except ROBSON and FOOTE, JJ., who dissented, and voted for affirmance.

Decree modified in accordance with the opinion of KRUSE, J., and as so modified affirmed, with costs to each of the parties appearing on this appeal by separate attorneys, payable out of the estate.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT
No. 2, TOWN OF TRENTON, Appellant, *v.* GEORGE W. CRILL,
Respondent.

Fourth Department, March 6, 1912.

Schools—action against non-resident—tuition—facts not showing residence within school district.

Action by a board of education of a school district to recover tuition for the defendant's children on the ground that they were non-residents of the district. It appeared that the defendant, who had previously lived in another town and paid tuition for his children as non-residents, had during the period in question rented a house within the school district where he lived through the winter, returning to his house in the other town during the summer. It further appeared that he was

Fourth Department, March, 1912.

[Vol. 149.]

assessed in the other town as a resident taxpayer, registered and voted there and held the office of supervisor. On all the evidence, *held*, that he was not a resident of the school district to which he moved during the winter and was liable for tuition.

It seems, that there may be cases where the voting residence of the father and the school residence of his children are not the same.

APPEAL by the plaintiff, The Board of Education of Union Free School District No. 2, Town of Trenton, from a judgment of the County Court of Oneida county, entered in the office of the clerk of said county on the 4th day of October, 1911, affirming a judgment of a Justice's Court in favor of the defendant, with notice of an intention to bring up for review an order entered in said clerk's office on the 4th day of October, 1911.

G. E. Pritchard, for the appellant.

E. Willard Jones, for the respondent.

KRUSE, J.:

The action is brought to recover for tuition of the defendant's two children, who, it is claimed, were non-residents of the plaintiff's school district. The defendant contends that they were residents, and that is the only question in the case.

The defendant's family consisted of himself, his wife, a boy and a girl. He lived with his family for many years on a farm in the town of Floyd, adjoining the town of Trenton which includes the school district where the defendant's children attended school. They attended the school during the school year of 1908-1909, and he paid tuition therefor at the usual rate for non-resident pupils. In August, 1909, the defendant rented a house or part of a house in the village of Holland Patent, within the bounds of the school district, with the privilege of buying it if he so desired, and moved into the house with his wife and children about the 1st of September, 1909. They brought with them sufficient household goods to keep house and left the rest in the house from which they moved. They lived there during the winter, the children attending school, and as soon as the school closed in the spring or early summer they stored what furniture they had in the house at Holland Patent and went back to the farm, where

App. Div.]

Fourth Department, March, 1912.

they lived during the summer, returning in the fall of that year, 1910, and living again in the house in Holland Patent, the children attending school as the year before. Finally, about the 1st of April, 1911, defendant gave up the house in Holland Patent.

The defendant refused to pay the tuition for the two years that he lived in Holland Patent upon the ground that he and his children were during that time residents of the district. The defendant testified that he considered his residence in Holland Patent from the time he moved there in September, 1909. But I think the circumstances show that he was not a resident of the school district. His permanent place of residence remained in the town of Floyd. That was his domicile. He was assessed there as a resident taxpayer. He registered and voted there after he had moved to Holland Patent and was elected to the office of supervisor and qualified and acted as such while he was living at Holland Patent. I think his school residence as well as his voting residence remained in the town of Floyd. He could not gain a school residence in the Holland Patent school district without losing it in the school district in which he lived in Floyd, where he had his domicile and permanent home.

Stress is laid on the provisions of the Education Law, which not only makes free to every person of the school age therein fixed, the school of the district or city in which he resides (Education Law [Consol. Laws, chap. 16; Laws of 1909, chap. 21], § 568; Education Law [Consol. Laws, chap. 16; Laws of 1910, chap. 140], § 567), but makes it compulsory for children of certain ages and in proper mental and physical condition to attend school, and provides among other things for the arrest of truant children, the punishment of parents who refuse to comply with the law and the punishment of persons who employ children under school age during the school year, except as therein provided. (Education Law [Consol. Laws, chap. 16; Laws of 1909, chap. 21], art. 20, as amd. by Laws of 1909, chap. 409; Education Law [Consol. Laws, chap. 16; Laws of 1910, chap. 140], art. 23 — both statutes being known as Compulsory Education Law.) And it is pointed out that in the report which the trustees are required to make on the first day of August in each year there shall be included in the number of

Fourth Department, March, 1912.

[Vol. 14]

children residing in the district all who on the thirtieth day of June last preceding of the age therein stated were actually in the district comprising a part of the family of their parents or guardians or employers, if such parents, guardians or employers resided at the time in said district, although such residence was temporary. But it is further provided in the same subdivision that such report shall not include children belonging to the family of any person who shall be an inhabitant of another district in the State in which such children may by law be included in the report of its trustees. (Education Law [Consol. Laws, chap. 16; Laws of 1909, chap. 21], § 198, subd. 4.) This subdivision was amended in 1910 by the Education Law passed that year (Consol. Laws, chap. 16 [Laws of 1910, chap. 140], § 276, subd. 4) by eliminating the provision respecting temporary residents of the district, including only such children of school age as shall have been legal residents of the district at a certain date therein named.

I do not think the provisions of the Education Law aid the defendant in his contention. It is very clear that his only purpose in living in Holland Patent was to send his children to school there, intending to return to the farm when that object had been attained. It is true that many people have a home in the city and another in the country, and some have more than all equally permanent; and there are even some whose various places of abode are so transient and temporary that it might be difficult to determine their legal residence at a given time. And there may be cases where the voting residence of the father and the school residence of his children is not the same; but that, I think, is not this case. Here, I think, the children as well as their father were not residents of the Holland Patent school district, and I think we should so hold as a matter of law.

If the conclusion I have reached is correct it follows that the judgment of the County Court and that of the Justice's Court should be reversed, with costs.

All concurred.

Judgment of County Court and of Justice's Court reversed, with costs in all courts to appellant.

**SYRACUSE, LAKE SHORE AND NORTHERN RAILROAD COMPANY,
Respondent, v. LIZZIE L. CARRIER and Others, Appellants,
Impleaded with FULTON SAVINGS BANK, Defendant.**

Fourth Department, March 6, 1912.

Railroad — electric railroad — construction of line to carry high tension current — when such line not extension of railroad — consent of Public Service Commissioners — eminent domain — condemnation of lands necessary to operation of railroad.

If the plan of an electric railroad already in operation to erect poles outside of its right of way for the purpose of carrying high tension wires around a village so as to avoid danger to the inhabitants be regarded as an extension of the railroad, the permission and approval of the Public Service Commissioners is essential and the map thereof must be filed with the Secretary of State.

But the construction of such line bearing the high tension current in such manner as to avoid danger to the inhabitants of a village may be regarded, not as an extension to, but as an addition, accommodation or facility for the railroad necessary to its operation within the meaning of the Railroad Law, and it may condemn lands for such purposes.

On condemnation for the purposes aforesaid it cannot be urged that the railroad should as a condition precedent have obtained permission of the local authorities to lead the electric wires across highways, where the lands sought to be condemned do not adjoin the highways at any point and the plaintiff is the owner in fee of so much of the highway as it seeks to occupy with its line.

It seems, that if such railroad intends in the future unlawfully to use its line to supply electricity to others, it may be restrained from so doing if a proper case be presented.

APPEAL by the defendants, Lizzie L. Carrier and others, from an order of the Supreme Court, made at the Onondaga Special Term and entered in the office of the clerk of the county of Onondaga on the 6th day of June, 1911, confirming the report of commissioners in condemnation proceedings, with notice of an intention to bring up for review a judgment entered in said clerk's office on the 14th day of March, 1911, appointing commissioners in said proceeding, and also the order of reference herein, dated the 21st day of January, 1909, the order made under section 3380 of the Code of Civil Procedure and entered in said clerk's office on the 2d day of January, 1909, giving plaintiff possession of the premises which are the subject of the

proceeding, and the order appointing commissioners herein which was contained in said judgment.

Louis L. Waters [King, Waters & Page], for the appellants

William Nottingham, for the respondent.

ROBSON, J.:

Plaintiff seeks in this proceeding to acquire for the purpose of constructing and maintaining thereon a double line of poles supporting wires and appurtenances for the overhead transmission of electric current at a high tension certain lands of which, it alleged in its petition, the defendants were the owners. It is a street surface railway corporation, owning and operating an interurban railroad, built on private right of way the whole distance except in villages and cities, where portions of the streets are used. The road is operated by electricity, and extends from the city of Syracuse to and through the village of Phoenix. The premises sought to be acquired in this proceeding are not, nor are they sought to be used as a part of its way for trackage or construction other than the transmission line. The course of this transmission line diverges from the line of plaintiff's roadbed for its tracks at a point some distance south of the premises in question and does not again coincide with it until a point a considerable distance north thereof is reached. The purpose of this divergence is to avoid carrying the high tension wires through the village of Phoenix, as would be necessary if they followed the trackage location at this part of the route. Plaintiff by agreement with the several owners thereof acquired the other lands necessary for this transmission line, but was unable to agree with the owners of the strip in question for its purchase and these proceedings for condemnation were instituted.

Plaintiff's certificate of incorporation was duly filed and recorded in September, 1905, and states that it is to form a corporation for the purpose of building, maintaining and operating a railroad and for the purpose of maintaining and operating a railroad already built. The kind of road to be built is, as stated, a street surface railroad to be operated by horse power, cable or electricity, and is to be built, maintained and operated from

App. Div.] Fourth Department, March, 1912.

Syracuse to Baldwinsville in the county of Onondaga, which places will be its termini. Prior to plaintiff's incorporation, a corporation, named Onondaga Lake Railroad Company, had built a part of this line from Syracuse northerly to Long Branch on Onondaga lake and had obtained from the Board of Railroad Commissioners in November, 1896, a certificate of public convenience and necessity under section 59 of the Railroad Law as it was at that date. (Gen. Laws, chap. 39 [Laws of 1890, chap. 565], § 59, added by Laws of 1892, chap. 676, and amd. by Laws of 1895, chap. 545.) Afterwards this line was duly extended to Baldwinsville; and the name of the corporation was changed to Syracuse, Lakeside and Baldwinsville Railway in 1898. The property and franchises of the last-named corporation were sold upon mortgage foreclosure and the same were transferred by the purchaser at such sale to plaintiff, which had been organized for the purpose of taking over the property. Thereafter in June, 1906, plaintiff executed and caused to be filed and recorded a certificate of extension pursuant to section 90 of the Railroad Law (as amd. by Laws of 1895, chap. 933) and pursuant to section 6 of that law (as amd. by Laws of 1892, chap. 676) made and filed a map and profile of such extension. Neither the certificate of extension nor the map and profile thereof contained any description of, or direct reference to, the location of this transmission line, nor was any notice of the proposed extension of the railroad then given to the owners of the premises in question. The construction of the roadbed and tracks, as extended, had apparently proceeded to practical completion before plaintiff made and filed in the office of the clerk of the county of Onondaga the map and profile of the proposed transmission line, which was done October 29, 1908. This map and profile were never at any time filed in the office of the Secretary of State. This, among others hereinafter referred to, was a necessary step, provided the transmission line is to be regarded as itself an extension of the railroad. Notice of filing and that the route designated thereby passed over premises occupied by them was thereafter served on the defendant owners. Nothing was done by them to secure a change of the route proposed.

That plaintiff's proceedings for the extension of its line of

tracks and right of way therefor from Baldwinsville to and through the village of Phoenix were regular in form and sufficient for that purpose I do not understand to be now questioned by appellants. It required no certificate of public convenience and necessity from the Board of Railroad Commissioners to enable it to take over and operate the railroad constructed and formerly operated by the Syracuse, Lakeside and Baldwinsville Railway, title to which it had acquired as transferee of the purchaser at the foreclosure sale. (*People ex rel. Third Ave. R. Co. v. Public Service Commission*, 203 N. Y. 299.) At the time it took the proceedings to extend its road from Baldwinsville the Public Service Commissions Law had not been passed and the consent of the Board of Railroad Commissioners to such extension was not required; for the proposed extension was not to "be practically parallel with a street surface railroad already constructed and in operation;" in which case only did the statute then in force (Railroad Law, § 59a, added by Laws of 1898, chap. 643, and amd. by Laws of 1902, chap. 226) require that such consent be first obtained. (*New York Central & Hudson River Railroad Co. v. Auburn Interurban Electric Railroad Co.*, 178 N. Y. 75.) But if the transmission line is to be regarded as an extension of the railroad, then, since the proceedings therein were begun after the enactment of the Public Service Commissions Law, concededly the permission and approval of the proper commission were necessary before beginning the proposed extension. (Public Service Commissions Law [Laws of 1907, chap. 429], § 53.) Therefore, since power is not given to condemn lands for the purpose of any extension of an existing road unless such extension is authorized by proceedings taken pursuant to some statute, plaintiff would for that reason alone not be in a position to maintain this proceeding. (*Matter of Greenwich & Johnsonville R. Co. v. G. & S. Railroad*, 172 N. Y. 462.)

But it does not seem that the construction of this transmission line can properly be regarded as an extension of plaintiff's railroad. If it is not to be considered as an extension, then plaintiff has no authority to condemn lands therefor unless such right is given it by statute to provide for other corporate needs; and such statutory "authority must be seen to apply

exactly to the case stated." (*Matter of Greenwich & Johnsonville R. Co. v. G. & S. Railroad, supra*; *Erie Railroad Co. v. Steward*, 170 N. Y. 172.) The Railroad Law as it existed at the time this proceeding was begun gave plaintiff authority to acquire by condemnation real estate necessary for the "construction, maintenance and accommodation" of its railroad "in the manner provided by law." (Railroad Law, § 4, subd. 2, as amd. by Laws of 1892, chap. 676.) By section 7 of the same law (as amd. by Laws of 1905, chap. 727) it was authorized in the same manner to acquire for use upon or in connection with its railroad "such additions, betterments and facilities as may be necessary or convenient for the better management, maintenance or operation" of its railroad. Transmission of electricity over the length of its road is concededly necessary, if the road is to be operated by that power. The overhead system plaintiff employs for that purpose requires for the reasonably economical use of the current its transmission at a high voltage by means of exposed wires. It appears without dispute that the custom in the construction of electric roads is to avoid whenever it is possible placing the high tension wires for any considerable distance in the streets of a city or village. One apparent and sufficient reason for this, as the evidence shows, is that in case of fire or other accident resulting in bringing the line down to the street or in case of an accidental contact with the line by telephone or telegraph wires the lives of persons in the street, or elsewhere who might come in contact with such a wire, would be menaced, and serious, if not fatal, consequences ensue. There is also an added danger in repair of telephone and telegraph lines near such a line; and even in the repair of the line itself, where telephone or telegraph wires are under it, the possibility that the men engaged in that service will not accidentally do something which will bring it in contact with the wires beneath and "thereby cause loss of life and property to people connected with the telephone lines either at the telephone instruments or stations," cannot be certainly guarded against. The danger from these high tension wires when strung in places where the possibility of contact with other wires is avoided is reduced to a minimum. The construction and operation of a railroad it

will be conceded should be after such manner as to provide for the safety, so far as possible, of all persons likely to be endangered thereby. The construction of this transmission line so as to avoid the village of Phoenix is the safer and is also the customary construction at such points. I think, therefore, it may properly be regarded as an "addition," an "accommodation," or a "facility" for plaintiff's railroad within the meaning of those terms as used in the statute above referred to. The following statement of VANN, J., in *Matter of New York, Lackawanna & Western R. R. Co.* (33 Hun, 148, 154; affd., 98 N. Y. 664) seems to be apt descriptively in the present investigation: "The purpose of its incorporation is to build and operate a railroad for public use. The operation of the road is as essential as its construction. The land in question, therefore, is needed for one of the legitimate purposes of the road, and when the necessity exists and a reasonable discretion is used the courts will not interfere even if the exercise of the power to take lands under the statute is attended with extreme inconvenience and hardship to individuals." (See, also, *Matter of New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546; *Matter of New York Central & H. R. R. Co. v. Met. Gas Light Co.*, 63 id. 326; *Matter of New York Central & H. R. R. Co.*, 77 id. 248.)

Appellants' counsel urges that it appearing that the proposed transmission line crosses two highways plaintiff must, as a necessary condition precedent to its right to begin this proceeding, have obtained the consent of the local authorities to cross these highways with its line. In support of this position *Matter of Rochester Elec. R. Co.* (123 N. Y. 351) and *Colonial City Traction Co. v. Kingston City R. R. Co.* (153 id. 540) are cited. These cases are apparent authorities that a corporation intending to engage in the construction of a street surface railway, or an extension thereof, must obtain the consent of the proper local authorities to use and occupy streets or highways for the construction of the road, or extension thereof, before it is in a position to pursue condemnation proceedings. But if I am correct in the conclusion that plaintiff's transmission line is not an extension of its road, but is an incidental necessity to its operation, then the provisions of the Railroad Law, upon

App. Div.] Fourth Department, March, 1912.

which the decisions above referred to are based, do not in terms apply. It may be that such consent must be obtained (and the record shows that it was in fact obtained) before plaintiff could legally cross the highways in question with its transmission line. But the land sought in this proceeding did not adjoin these highways at any point; plaintiff was the owner of the fee of so much of the highways as it sought to occupy with its line, and under the circumstances it would seem the procurement of such consent was not necessarily required to be had before plaintiff could begin this proceeding. (*Matter of New York Central & H. R. R. Co.*, 77 N. Y. 248; *Matter of People's R. R. Co.*, 112 id. 578, 584.)

Appellants also insist that plaintiff purposes to use this transmission line to supply electricity for the use of others not in any way connected with the railroad or with its operation. It appears from the proof that the transmission line as projected and constructed is not only proper, but is necessary, for the operation of the railroad. If plaintiff shall hereafter use it for purposes so foreign to those to serve which it was by law authorized to prosecute this proceeding and injury to the rights of the defendants, or their successors in interest, should result therefrom, doubtless such unauthorized use would be restrained if a proper case was presented.

The other objections urged by appellants' counsel have all been considered; but none of them appear to be of sufficient importance to warrant interference with the judgment and orders appealed from.

The judgment and orders should be affirmed, with costs.

All concurred.

Judgment and orders affirmed, with costs.

THE BEAUTY SPRING WATER COMPANY OF LYONS FALLS,
Appellant, v. THE VILLAGE OF LYONS FALLS, Respondent

Fourth Department, March 13, 1912.

Tax — construction of municipal water works — liability of competing company.

A water corporation which originally furnished water to a village will be granted a decree in equity restraining the enforcement of a tax against it for village water works subsequently constructed and operated in competition, where it appears that the supply of water formerly furnished was inadequate for domestic purposes and furnished no protection whatever, while the municipal water works are adequate and have produced a material decrease in fire insurance premiums.

MCLENNAN, P. J., dissented.

APPEAL by the plaintiff, The Beauty Spring Water Company of Lyons Falls, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Lewis on the 10th day of June, 1911, upon the decision of the court rendered after a trial at the Lewis Special Term.

The action was commenced on the 29th day of June, 1910, to restrain the defendant from enforcing certain taxes against the property of the plaintiff.

C. S. Mereness, for the appellant.

Harry W. Cox, for the respondent.

KRUSE, J.:

The plaintiff, a domestic water corporation, challenges the validity of a tax imposed against it by the defendant village for village water works purposes, contending that the village system was installed and is now operated in competition with that of its own.

The question has been here before on an appeal from an order which vacated an order to examine the plaintiff as a debtor. The vacating order was reversed by this court (*Matter of Beauty Spring Water Company*, 134 App. Div. 17); and upon appeal to the Court of Appeals, that order was affirmed upon the ground that questions both of law and fact were pre-

App. Div.] Fourth Department, March, 1912.

sented which should be tried out in an action in equity (*Matter of Beauty Spring Water Company*, 198 N. Y. 413.) Thereupon this action was brought, and after trial the complaint dismissed upon the merits, and from the judgment entered upon that decision this appeal was taken.

The plaintiff has been defeated upon the facts. As the case now stands I think plaintiff is not entitled to equitable relief. The claim that the defendant has no right to tax the plaintiff for installing and maintaining a municipal water works system in competition with its own might be well founded if the plaintiff had furnished an adequate supply of water to meet the requirements of the village; or perhaps it might be entitled to some relief if the supply was sufficient for that part of the village in the town of West Turin, from whose officers it obtained its franchise before the defendant village was organized, and which includes most of the inhabited part of the village. But the finding of the trial judge is that the plaintiff's water works system before the installation of the village system was at times inadequate for domestic purposes and furnished no fire protection at all; that the defendant's water works system, which was installed in the year 1906, is adequate for domestic purposes for the village and for fire protection, and that since the installation of the village system the fire insurance premiums have materially decreased. I think, in view of this finding, which is supported by evidence, the plaintiff is not entitled to equitable relief irrespective of any other question.

The judgment should, therefore, be affirmed, with costs.

All concurred, except McLENNAN, P. J., who dissented in an opinion.

McLENNAN, P. J. (dissenting):

The Beauty Spring Water Company was duly incorporated under the laws of the State of New York as a private water corporation. Its charter was duly filed June 23, 1896, and the purpose of the company, as set forth in its charter, is "to supply water to the inhabitants of the town of West Turin, Lewis county, New York." The proper consent of the town authorities of West Turin had previously been obtained. The company was incorporated as provided in the Transporta-

Fourth Department, March, 1912.

[Vol. 149.]

tion Corporations Law (Gen. Laws, chap. 40 [Laws of 1890, chap. 566], § 80 *et seq.*, as amd.), and by section 82 of such chapter, being the former Transportation Corporations Law (Gen. Laws, chap. 40, as amd. by Laws of 1892, chap. 617), water companies organized pursuant to that act were authorized "to lay their water pipes in any streets or avenues or public places of an adjoining city, town or village, to the city, town or village where such permit has been obtained." (Since amended by Laws of 1905, chap. 210, and Laws of 1906, chap. 455; now Consol. Laws, chap. 63 [Laws of 1909, chap. 219], § 82.)

In 1899 the village of Lyons Falls was duly incorporated as a village of the fourth class, and was largely made up of territory in the town of West Turin, but also included within its corporate limits a portion of the adjoining town of Lyonsdale. The village comprises a strip of land about one and one-half miles in length and one-half mile in width. It had 775 inhabitants in 1910. In 1905 the village of Lyons Falls made application to the State Water Supply Commission for authority to install a municipal water system of its own, and the application was granted. The village installed the system, which is conceded to be ample to furnish water for fire protection and domestic use within the village.

No question is raised as to the purity or quality of the water furnished by the plaintiff. The court has found, however, that before the installation of the defendant's system the plaintiff's system was at times inadequate for domestic purposes, but I think the evidence, as well as the specific findings of the court as to the instances in which the water failed at certain points, show that the plaintiff has practically at all times furnished an ample supply of water for domestic use, and that only in a few isolated instances, extending over a period of many years, has the supply been insufficient or the pressure too low to furnish all the water needed for domestic purposes. The court has also found that the plaintiff's system is inadequate to furnish fire protection to the village, but I think this is immaterial, as the furnishing of fire protection is purely a municipal and governmental function and one which the village has the right to undertake for itself, and was not one of the purposes contem-

plated by or required of the plaintiff. As was said by the Court of Appeals in *People ex rel. Mills Water Works Co. v. Forrest* (97 N. Y. 97, 100): "The State authorizes the formation of water works companies in its towns and villages, * * * but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its supply of water from the company so formed." It seems to me that the failure or refusal of the plaintiff to furnish fire protection to the defendant is not the test of whether it has fulfilled the purposes for which it was incorporated, in the absence of any express provision in its franchise, or contract to that effect. Indeed, it is conceded in this case that whatever fire protection the plaintiff assumed to furnish to the defendant was furnished gratuitously and not in pursuance of any contract. As before stated, I think the evidence shows no substantial default in at all times furnishing a pure and sufficient supply of water to all plaintiff's customers. No general failure of the whole system, even temporarily, was shown, and the most of the trouble shown was with the supply furnished to the New York Central railroad for use in its engines. It does not seem to me important that the plaintiff was at times unable to furnish all the water needed by a railroad for running its engines.

For the purpose of installing and maintaining the defendant's municipal system, certain taxes have been levied upon all the taxable property within the village of Lyons Falls, including the plaintiff's water system and property, which, as far as it is concerned, the plaintiff insists it is not legally obliged to pay and equitably should not be called upon to pay. The installation of defendant's municipal system has concededly greatly impaired the earning capacity of the plaintiff.

I think that under the decisions of the Court of Appeals in *Skaneateles Water Works Co. v. Village of Skaneateles* (161 N. Y. 154) and *Warsaw Water Works Co. v. Village of Warsaw* (Id. 176) the defendant has no authority to so tax the plaintiff. Under those decisions I think it is clear that the defendant had the right to install a municipal water system of its own, and to thereby enter into competition with the plaintiff in furnishing water to the inhabitants of the

village, and if the result of such competition is disastrous to the plaintiff, it cannot complain, for it has no exclusive franchise or contract to furnish water to the inhabitants of the defendant village. But I do not agree that the defendant can levy taxes upon plaintiff's corporate property for the purpose of installing, making additions to and maintaining a water works system in competition with the plaintiff. I think that legally it has no right to do so, under the decisions cited above, and that such course is not equitably justifiable under the evidence in this case.

I think that the acts of the defendant in taxing the plaintiff for the payment of the obligations incurred in the construction of defendant's system are in contravention of the provisions of section 10 of article 1 of the Federal Constitution, and void.

As to the equitable considerations involved, it appears that when the consent of the State Water Supply Commission was being sought it was practically understood by that commission and by all parties concerned that the defendant would proceed to acquire by purchase or proper condemnation proceedings the plaintiff's system. Thereafter a proposition was submitted to the taxpayers of the village to purchase plaintiff's system for \$9,000, but was voted down at the election. No further steps toward that end have been taken. On the contrary, the defendant has proceeded to levy taxes on all taxable property within the village for the purpose of paying for the municipal system, thereby compelling plaintiff's customers to contribute to the support of a system which they do not use, and practically coercing them into using the water furnished by the village, for it is difficult to see how any taxpayer of the village would long continue to contribute to the support of two water systems when he only used the water furnished by one of them. So that I do not see how it can be said that either legally or equitably the defendant is entitled to tax the property of the plaintiff for the purpose of installing and maintaining its municipal water works system.

I, therefore, vote for reversing the judgment appealed from and granting a new trial, with costs to the appellant to abide the event.

Judgment affirmed, with costs.

JOHN J. CASEY, as Administrator, etc., of ANNA L. CASEY, Deceased, Appellant, *v.* THE DAVIS & FURBER MACHINE COMPANY, Respondent.

Fourth Department, March 6, 1912.

Appeal — when decision law of case on new trial — master and servant — negligence — injury by fall of piece of a machine — res ipsa loquitur — respondeat superior — when person causing accident not acting for defendant.

Where on an appeal from a judgment in a negligence action it was held that the relation of master and servant did not exist between the defendant and the person who was responsible for the accident, it is the law of the case on a new trial if the proof on that issue is substantially the same. Even though the fact that an iron ball fell from a machine in a factory and injured an employee may be *prima facie* proof of negligence of the owner of the factory under the rule of *res ipsa loquitur*, yet where it is sought to charge a manufacturer who had sent its employee to install a machine in a factory with liability it must be shown that the employee at the precise time of the accident was engaged in the work of his employer. The defendant, a manufacturer, sent its agent to install in a mill a carding machine manufactured by it. It paid the agent's wages but his expenses were paid by the mill owner. Having set up the carding machine and while engaged in bolting thereto another machine not furnished by his master but belonging to the mill he allowed an iron ball to fall from the latter machine so that it resulted in the death of an employee.

Held, that, under the circumstances, the person who caused the ball to fall was not at the time acting for his employer which, therefore, was not liable.

MCLENNAN, P. J., and SPRING, J., dissented.

APPEAL by the plaintiff, John J. Casey, as administrator, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 23d day of May, 1911, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case on a trial at the Onondaga Trial Term.

Stewart F. Hancock, for the appellant.

Louis L. Waters, for the respondent.

Foote, J.:

Plaintiff's intestate, Anna L. Casey, began an action in her lifetime for the same cause of action as here against this defendant. The cause was tried and a verdict rendered in

Fourth Department, March, 1912.

[Vol. 149.]

her favor and judgment thereon entered on March 20, 1909. Defendant appealed to this court on April 15, 1909. Miss Casey died on April 14, 1909. On the 7th of September, 1909, her father, the plaintiff, was appointed administrator of her estate and was later substituted in her place as plaintiff and respondent. On the 4th of May, 1910, said appeal was determined in this court and the judgment reversed and a new trial granted (see 138 App. Div. 396). Plaintiff thereafter and on July 9, 1910, appealed to the Court of Appeals, and thereafter and on December 16, 1910, said appeal was withdrawn by consent of the Court of Appeals, on motion of plaintiff. No new trial of said action has been had, but on February 23, 1911, plaintiff began this action for the same cause, which came to trial on May 23, 1911, and resulted in a nonsuit at the close of plaintiff's case.

Defendant is a Massachusetts corporation engaged in the business of manufacturing carding machines and other machinery for woolen mills. The Crown Mills is a corporation owning and operating a woolen mill at Marcellus in the county of Onondaga. Plaintiff's intestate was an employee in the Crown Mills. She was injured on January 17, 1907, at the mill where she worked by an iron ball which fell from a machine on the floor above and rolled through a hole in the floor made for and through which a belt was running. The ball struck a large revolving pulley underneath this hole and was thrown or deflected so as to strike Miss Casey's head as she was working at a machine on the floor below some distance away from the pulley. It is conceded that the injury she received subsequently caused her death.

On the 28th of June, 1906, the Crown Mills made a contract with defendant by which defendant was to manufacture for it for use in its mill at Marcellus a carding machine. It seems to have been the understanding, although the written contract did not so provide, that defendant was to send a man to the Crown Mills to set up and adjust this carding machine ready for use. The machine was made and shipped to the Crown Mills, the parts not being put together, and on or about January 3, 1907, one Arthur Clow, an employee of defendant, was sent by defendant to Marcellus to set up this carding

App. Div.]

Fourth Department, March, 1912.

machine at the Crown Mills. His wages were paid by defendant, but his expenses to and from Marcellus were paid by the Crown Mills, together with his expenses at Marcellus. On the 17th of January, 1907, he had practically completed setting up the carding machine, and had also bolted to the carding machine another machine, to be used in connection with it, which belonged to the Crown Mills, and which had not been purchased of or furnished by defendant. It was called an automatic feed machine, and was used to feed the wool into the carding machine. The iron ball which injured plaintiff's intestate was a part of this feed machine. As Clow had completed bolting the feed machine to the carding machine he noticed that the iron ball was insecurely bolted to the feed machine, so that it would not properly perform its function, and he took a wrench to tighten the nut on the bolt which fastened it to the machine, and in some manner not explained by the evidence, and apparently not known to Clow, who was a witness for plaintiff, the ball fell onto the table of the feed machine, rolled off onto the floor, rolled around to the further side of the belt which was running through this hole in the floor, and down into the hole, which was just large enough to permit the ball to pass through. This hole was some twelve to eighteen inches away from the machine. It does not appear whether Clow was asked to connect the feed machine to the carding machine by any one in the employ of the Crown Mills, or whether he did it on his own motion. There is evidence from which it might be found that he could not successfully test the carding machine without having the feed machine attached. It does not appear that defendant had undertaken to connect the feed machine with the carding machine.

The question in the case is whether Clow in the act of connecting the feed machine to the carding machine and adjusting the iron ball on the feed machine was acting as the servant of defendant in the business of defendant, or rather whether there is evidence sufficient to require the submission of this question to the jury as a question of fact.

As respects this question, it does not differ from that presented upon the appeal in the former action. Four justices of this court concurred in the opinion in that case, where, in refer-

Fourth Department, March, 1912.

[Vol. 149.]

ence to this question, it was said: "I think the relation of master and servant did not exist between the defendant and Clow as regards the work in connection with which it is claimed Clow was careless. The defendant had nothing to do with furnishing or setting up the feed. Under the contract between the defendant and the Crown Mills the defendant agreed to furnish a carding machine and to send a man to set it up, the defendant to pay his wages and the Crown Mills his expenses.

* * * While it was the right and perhaps the duty of the defendant to test the carding machine after it was set up, Clow, who was called as a witness by the plaintiff, finally admitted that the carding machine could be tested without the feed, and that fact is fairly established by the evidence, although it may have been more practicable to use the feed in making the test. But even if necessary to set up the feed to test the carding machine, I fail to see how the defendant can be made liable for the careless act in question any more than it could if Clow had assisted in doing work in installing the engine or any other part of the machinery necessary to furnish the power or operate the carding machine, but not connected with the setting up of the machine."

It now appears, as it did in that case, that defendant had nothing to do with furnishing or setting up the feed. It does not appear now, as it did in the former case, that Clow set up the feed under an arrangement with the foreman of the Crown Mills for an exchange of work, or that Clow had specific instructions from defendant not to set up feeds except when sold by defendant, or that Clow set up the feed machine at the request of the Crown Mills; hence, what was said in the opinion in respect to these matters does not apply here. But that part of the opinion above quoted is applicable, and justified, if it did not require, the disposition of the case which the trial justice has made, unless we are prepared to reconsider and reverse the ruling then made.

This we are asked to do upon the ground that plaintiff makes a *prima facie* case by proving the occurrence of the accident and by identifying the person responsible for the accident as the servant of defendant, under the doctrine of *res ipsa loquitur*, and in support of this the falling-object cases are cited: *Wolf*

App. Div.]

Fourth Department, March, 1912.

v. *American Tract Society* (164 N. Y. 30) (a case of a brick falling upon a workman); *Hogan v. Manhattan R. Co.* (149 id. 23) (a case of an iron bar falling upon a person driving along the street); the cases of *Reilly v. Atlas Iron Construction Co.* (83 Hun, 196) and *Guldseth v. Carlin* (19 App. Div. 588) (cases of brick falling upon workmen), and *Dohn v. Dawson* (90 Hun, 271) (a case of an object falling upon a workman).

If this were an action against the Crown Mills whose business was being conducted in this building, undoubtedly plaintiff's evidence would have made a *prima facie* case against that company, but here, I think, the burden was upon plaintiff to show that Clow in the very act of handling this iron ball was engaged in defendant's work; it is not enough that defendant had work in progress in this building and that Clow was its agent in the performance of that work. If we assume that plaintiff's proofs were sufficient to have made a case in an action against Clow himself or against the Crown Mills, it does not follow that it would make a case against this defendant under the doctrine of *respondeat superior*. The facts here are not in dispute; nor is it a case where different inferences may be drawn from the conceded facts. Clow was engaged upon a piece of work with which his master, the defendant, had nothing whatever to do. If he was doing it to save his own time in order to sooner be in a position to test the carding machine, still it was work which the Crown Mills was bound to do as between it and defendant and it was work for the Crown Mills and the detail of which the Crown Mills had a right to control. Hence, there can be no inference that it was defendant's work.

I think the learned trial justice was right in following the former decision of this court and that the nonsuit was properly granted.

None of the other grounds of error urged by appellant are sufficient, we think, to require a reversal of the judgment, which should be affirmed, with costs.

All concurred, except McLENNAN, P. J., and SPRING, J., who dissented upon the ground that the questions as to whether Clow was an employee of the defendant at the time of the accident and whether he was negligent were questions of fact for the jury.

Judgment affirmed, with costs.

In the Matter of the Estate of ELIZABETH B. WHITE, Deceased.
CARL T. CHESTER, as Executor, etc., of ELIZABETH B. WHITE,
Deceased, Appellant; THE COMPTROLLER OF THE STATE OF
NEW YORK, Respondent.

Fourth Department, March 6, 1912.

Tax — transfer tax — valuation of life estate.

An appraiser in assessing a transfer tax upon property passing under a will should ascertain the value of the estate or interest as of the date of the testator's death.

The statute intends that the tax so far as possible shall be based not upon the value of the property itself but upon the value of the right of succession.

While in determining the value of the right of succession to a life estate the statute authorizes a calculation based upon the tables of mortality, the tables are not applicable where the duration of the estate can be ascertained with certainty, as where the life beneficiary dies before the tax is assessed.

APPEAL by Carl T. Chester, as executor, etc., from a decree of the Surrogate's Court of the county of Erie, entered in said Surrogate's Court on the 21st day of September, 1911, affirming an original determination of said surrogate upon the report of the transfer tax appraiser affixing the transfer tax upon the estate of Elizabeth B. White, deceased.

Carl H. Smith, for the appellant.

Edward N. Mills, for the respondent.

Foote, J.:

In the order appealed from the learned surrogate has held that the transfer tax upon the life estate in a fund of \$200,000, bequeathed by the will of Elizabeth B. White to a trustee in trust to invest and pay the income to Gilbert B. Morgan, grandson of the testatrix, during his life, is taxable on a valuation of the legacy based upon the probable duration of the life of the grandson at the time of the testatrix's death, ascertained by the Superintendent of Insurance according to the standards in use in his office, notwithstanding the fact that the grandson Morgan died about eight months after the testatrix and before the

App. Div.] Fourth Department, March, 1912.

proceedings had been taken to appraise the estate or fix the amount of the tax.

The testatrix, Elizabeth B. White, died on March 2, 1908. By her will a trust fund of \$200,000 was vested in a trustee in trust to invest and keep invested and apply the income, among other things, "to the support and maintenance of my grandson, Gilbert Bulkeley Morgan, during his natural life, in such manner as my said trustee in his discretion, may deem for the best interest of my said grandson." On the death of the grandson without issue the principal of this fund was bequeathed to the Board of Home Missions of the Presbyterian Church of the United States of America. A contest arose over the probate of the will, which continued until the 18th of April, 1910, when the will was admitted to probate. Transfer tax proceedings upon the estate were instituted on June 4, 1910, and were concluded and the report of the appraiser made on October 17, 1910. Gilbert B. Morgan, the grandson and beneficiary of this trust fund for life, died on November 8, 1908, unmarried and without issue. Notwithstanding his death, the transfer tax appraiser called upon the State Superintendent of Insurance to determine the value of Gilbert B. Morgan's life estate in this fund, and such value was fixed by the Superintendent of Insurance as \$138,809 as of March 2, 1908, the date of the testatrix's death. This value was based upon the probable duration of the life of Gilbert B. Morgan at that time, according to the experience tables of mortality in use in the insurance department. On this valuation the surrogate assessed the tax upon Gilbert B. Morgan's interest in this fund at \$1,388.09. This decision was subsequently reviewed by the surrogate on the executor's appeal and the decision affirmed, whereupon the executor appealed to this court.

The view of the learned surrogate, as disclosed by his opinion, is that the case is controlled by section 230 of the Tax Law, which provides the method of ascertaining the value of annuities or other future interests in estates dependent upon a life or lives in all respects as if the life tenant had been living at the time the appraisal was made.

We think this view is erroneous. Section 222 of the Tax Law provides that "All taxes imposed by this article shall be

due and payable at the time of the transfer, except as herein otherwise provided." (See Gen. Laws, chap. 24 [Laws of 1896, chap. 908], § 222, as amd. by Laws of 1905, chap. 368; now Consol. Laws, chap. 60 [Laws of 1909, chap. 62], § 222.)

By section 230 the surrogate is required by order to direct one of the official appraisers "to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article." By the same section the appraiser, after giving notice of the time and place when he will appraise the property, "shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof." As to annuities, etc., the same section provides: "The value of every future or limited estate, income, interest or annuity *dependent upon any life or lives in being*, shall be determined by the rule, method and standard of mortality and value employed by the Superintendent of Insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum."

Under these statutes it is the duty of the appraiser to ascertain the value of the estate or interest subject to tax as of the date of the transfer which in this case is the date of the death of the testatrix, but, as to the property of the estate in general, he is to take evidence from which that value may be ascertained. It is the manifest intent of these statutes that the tax, so far as possible, shall be based upon the actual ascertained value not of the property itself but of the right of succession to the property. (*Matter of Sloane*, 154 N. Y. 109.) But where the right of succession is for life only, the duration of that life being uncertain, the exact value cannot be ascertained. Hence, the provision for estimating the value based upon the experience tables of the Superintendent of Insurance. This provision of the statute, however, is contained in the directions to the appraiser as to his method of procedure and refers to the

App. Div.]Fourth Department, March, 1912.

condition of affairs at that time, which may not be the same as existed at the death of the testator. Hence, we think that when the statute says to the appraiser: "The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the Superintendent of Insurance," etc., it refers to a case where the future estate is then, at the time of the appraisal, dependent upon a life or lives then in being, and that it has no application to a case like the present, where the life upon which the future estate was limited was not in being at that time. At the time the appraisal was made here the value of the life estate of Gilbert B. Morgan could be determined with certainty, and there was no occasion for resorting to the method of estimating its value according to experience tables of mortality. The purpose of the statute was to afford a method of valuing an estate or interest not capable at the time of ascertainment with exactness because of the uncertainty attendant upon the duration of an existing life. To such a case the statute clearly applies, but where there is no such uncertainty the reason for the statute rule does not exist, and, hence, the statute was not intended to apply in such a case.

We think the order and decree of the surrogate appealed from should be reversed and the matter remitted to the Surrogate's Court and that the tax in question should be assessed upon the value of the interest of Gilbert B. Morgan's life estate according to the actual duration of his life, with costs and disbursements to appellant.

All concurred.

Decree of Surrogate's Court reversed and matter remitted to the Surrogate's Court with directions to levy tax in accordance with the opinion of FOOTE, J., with costs and disbursements to the appellant.

WILLIAM E. DAVENPORT, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Fourth Department, March 20, 1912.

Malicious prosecution—arrest for theft from freight car—probable cause—evidence—investigation by detective after charge of theft.

A detective employed by a railroad company to prosecute persons stealing from freight cars had probable cause as a matter of law to cause the arrest and prosecution of a brakeman for theft where, without improper motive or malicious intent, he acted on sworn statements made by other persons who, having admitted that they were guilty of theft, charged in sworn statements that the brakeman prosecuted was also guilty of specific larcenies.

In an action against the railroad for malicious prosecution following such arrest, it is error for the court to refuse to allow the railroad detective to testify as to the investigation he made with reference to other larcenies when acting on the information received from the persons who confessed their guilt.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 16th day of May, 1911, upon the verdict of a jury for \$400, and also from an order entered in said clerk's office on the 20th day of May, 1911, denying the defendant's motion for a new trial made upon the minutes.

Leroy B. Williams, for the appellant.

Frank E. Young, for the respondent.

Foote, J.:

The plaintiff has recovered a verdict of \$400 for malicious prosecution. He was arrested on process issued by a justice of the peace upon the complaint of one Hatfield, who was employed by defendant as a detective officer at its freight yards in the towns of De Witt and Manlius, near the city of Syracuse.

It is urged by defendant in support of this appeal that on the undisputed evidence defendant's agent, Hatfield, as matter of law, had probable cause for instituting the criminal prose-

cution against plaintiff. We think defendant is correct in this contention.

Hatfield had been employed by defendant in this freight yard for about three and a half years, and at Buffalo three years before that; he had two assistants under him; there had been numerous thefts from the freight cars located at defendant's yards at De Witt, and it was Hatfield's business to investigate and prosecute for these thefts, if he could discover who had stolen the property. Plaintiff was a brakeman employed in this yard. One Gilmore and Beam were also brakemen employed in the same yard. Early in May, 1910, Gilmore and Beam had been arrested, charged with thefts from the freight cars in this yard, and had acknowledged their guilt and given information to Hatfield as to other brakemen in the yard who had also been in the habit of stealing from the cars, and, among others, plaintiff Davenport. On May 23, 1910, Hatfield, with Gilmore, went before Justice of the Peace Orry R. Evans, in the town of De Witt, and Gilmore there made an affidavit in reference to his knowledge of plaintiff stealing property from defendant's cars. He made a statement and the justice took it down in writing, and Gilmore signed and swore to it as an affidavit. In this statement he said that he had known Davenport for about four years; that about two years prior he saw Davenport get into a car loaded with merchandise in the fast freight yards of defendant in the town of Manlius, and when he came out he had two dozen oranges; after that he saw him coming from a car with two pieces of meat from the refrigerator car; they looked like pork loins; that about a year ago he saw him coming out of a loaded car, the seal of which had been broken, with two pairs of men's shoes, and had them under his coat; about two weeks later he saw him coming from a loaded car, the seal of which had been broken, with two pairs of ladies' slippers of good quality; eight or nine months ago he saw him stand opposite a loaded car and had in his possession three or four pairs of men's working gloves, and he asked Gilmore if he wanted some and Gilmore said, "No," and Davenport said, "All right;" "about two weeks ago I saw him reach into a loaded

Fourth Department, March, 1912.

[Vol. 149.]

car and get two or three rose bushes and a quantity of seeds and bulbs." After this affidavit was sworn to and on the same day Hatfield made an affidavit before the same justice, charging plaintiff with stealing the two rose bushes and a quantity of bulbs and seeds of the value of two dollars, being the last items referred to in Gilmore's affidavit. On these two affidavits the justice issued his warrant, plaintiff was sent for, pleaded not guilty and was allowed to go on his own recognizance and was afterward tried and acquitted. Hatfield had no personal acquaintance with plaintiff and nothing appeared to indicate that either Hatfield or any one connected with defendant had any malice toward plaintiff or motive for seeking to injure him. Early in May, another brakeman, Beam, had been arrested and confessed to have stolen from defendant's cars in this same yard, and on the sixth of May he made a long affidavit reciting numerous larcenies known to him, and stated near the close of the affidavit that among the railroad men that he knew had stolen goods from the cars at De Witt yards were several conductors and brakemen, whose names were given: "George Gilmore, a brakeman named Davenport and a brakeman named Doyle." This affidavit Hatfield had in his possession. He had investigated a number of the cases and had some of the persons arrested and some had been convicted.

The evidence given by plaintiff upon the trial of the present case consisted of that of Hatfield to show that he was in the employ of defendant company, and his duties in that employment; that a few days before he caused plaintiff's arrest he had procured a search warrant and searched plaintiff's house and had found certain cushions, lanterns and torpedoes which appeared to be railroad property but not known to him with certainty to be railroad property and claimed by plaintiff's wife at the time the search was made to belong to parties residing at her house or to be rightfully in their possession. Next, the evidence of the justice, Evans, who produced his docket and testified that plaintiff was arraigned and tried before him with a jury and that the jury brought in a verdict of not guilty and that Davenport was acquitted and discharged. Next, the evidence of plaintiff himself, to show his employment with defendant and its duration; his arrest; that he had

App. Div.] Fourth Department, March, 1912.

never stolen anything from defendant's cars; that he had some rose bushes in his yard; that the property found in his house at the time the search was made was not stolen property; that he knew Gilmore and did not know Hatfield; that he worked as a brakeman on the road, running on freight trains, and then worked as a brakeman in the yard about five years; that about May ninth he and his wife had set out in his yard some rose bushes which he had purchased from a nursery firm of Geneva. Next, the deposition of plaintiff's wife, who was ill, to show the circumstances of the search of her house by Hatfield and information which she gave Hatfield at the time in respect to the several articles found, to the effect that they were not stolen property. During the cross-examination of Hatfield by defendant's counsel the facts were brought out in reference to the information which Hatfield had received from Beam and Gilmore and that he believed these statements and acted in good faith and without malice in causing plaintiff's arrest. The two affidavits were received in evidence on this cross-examination, and defendant's counsel went fully into the examination of this witness in behalf of defendant. Plaintiff gave no other testimony, and, after he had rested, defendant recalled the justice, Evans, who testified to the circumstances of his taking Gilmore's affidavit. This is substantially all the testimony upon the trial. Plaintiff offered no evidence as to what took place upon his trial before the justice, and it did not appear whether Gilmore was called as a witness or what other witnesses gave testimony.

For aught that appears in this record, plaintiff may have been acquitted on the ground that he was prosecuted in the wrong town and not on the merits, as plaintiff's counsel now points out that part of this freight yard was in the town of Manlius and part in the town of De Witt, and that Hatfield testified on this trial that the yard where this car that the rose bushes were stolen from was located in the town of Manlius.

In the absence of evidence of some improper motive or malicious intent, we think it should be entirely safe for a detective officer to procure the arrest and prosecution of an individual in reliance upon the sworn testimony of a person who claims to have personal knowledge of the guilt of the accused

party. In most cases which have come before the courts, the information which was acted upon in starting prosecutions was not in the form of an affidavit or given under oath.

There was nothing in the evidence to show that Hatfield had, or should have had, suspicion of the truth of the facts contained in Gilmore's affidavit, nor did it appear that Hatfield had other means of information at hand, or that good faith required him to seek for further information, nor is it suggested that he could have made further investigation, except to go to the plaintiff himself and ask him if he was guilty; this we do not think he was called upon to do. It is true that the two persons from whom Hatfield received his information of plaintiff's supposed guilt had themselves confessed stealing property from defendant's cars, and from this circumstance it is urged that Hatfield should not have considered himself entitled to rely upon any information which they gave concerning others. No doubt he was called upon to bear in mind the fact that his informants themselves were confessed thieves. The fact that they were such, however, placed them in a position to have knowledge of the guilt of others, and in the absence of any reason for doubting their story, we think the fact that they were in a position to have knowledge of the facts entitled Hatfield to give credence to their statements, to the extent of accepting them as probably correct and acting accordingly.

Public policy requires that a person having information which satisfies him that another person has committed a crime should be free to institute a prosecution therefor, where there is no ulterior motive, without fear of subjecting himself to personal liability in damages in case the prosecution fails, and especially should this be true in the case of public officers, or persons who by their employment are charged with a duty in respect to the enforcement of the criminal law.

We think within the rule laid down in *Kutner v. Fargo* (34 App. Div. 317); *Anderson v. How* (116 N. Y. 336), and *Rawson v. Leggett* (184 id. 504), it must be held, as matter of law, that on the evidence given at the trial in this case Hatfield had probable cause for instituting the criminal prosecution against Davenport.

We are also of opinion that the learned trial court was in

App. Div.] Fourth Department, March, 1912.

error in refusing to permit Hatfield as a witness to testify as to the investigation he made in reference to the information he received from Gilmore as to other larcenies in this freight yard and the result of such investigation, and that defendant's exceptions to such exclusion were well taken. The principal question in the case was as to whether Hatfield was justified in acting upon the information he received from Gilmore in reference to plaintiff's supposed guilt of the crime of petit larceny. He had at the same time received information of the guilt of other persons of similar larcenies at the same place. We must assume, if he had been permitted to answer these questions, it would have appeared that he investigated Gilmore's information as to these other larcenies and found it to be correct. If so, the evidence would have been competent and persuasive in justification of his conduct in accepting and acting upon Gilmore's information as to plaintiff.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to defendant to abide the event.

All concurred; ROBSON, J., in result only.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

HARVEY E. ROBERTS, Appellant, v. DWIGHT THOMPSON, Respondent.

Fourth Department, March 20, 1912.

Process — service upon non-resident plaintiff while attending trial.

A non-resident plaintiff coming into this State as a necessary witness in his own case cannot, within an hour after the trial of his own action and before he has had an opportunity to leave the State, be served with a summons in another action brought by the defendant.

It seems, however, that there may be cases where service may be made upon such non-resident if necessary for the full protection of our own citizens.

APPEAL by the plaintiff, Harvey E. Roberts, from an order of the Supreme Court, made at the Steuben Special Term and

Fourth Department, March, 1912.[Vol. 149.]

entered in the office of the clerk of the county of Steuben on the 5th day of December, 1911, setting aside the service of a summons herein.

* *Milo M. Acker [Acton M. Hill and Floyd E. Whiteman of counsel], for the appellant.*

Harry L. Allen, for the respondent.

FOOTE, J.:

Defendant is a resident of the State of Pennsylvania, being a wholesale dealer in lumber at the city of Pittsburg. He was served with the summons in this action at the city of Corning while attending the trial of an action at the Trial Term of this court in that city, in which he was plaintiff and the plaintiff here was defendant, and within an hour after the trial of that action had been completed and before he had any opportunity to leave this State for his home. He was a necessary and material witness upon that trial.

The question is whether our courts should take jurisdiction of an action brought under such circumstances.

Appellant does not question the rule, which is well settled in this State, that a witness or a party defendant coming into this State voluntarily to attend a trial is privileged and to be protected from the service of civil process until the conclusion of the trial which he comes to attend and a sufficient time thereafter to enable him to return to his home. It is claimed that this rule does not apply where the non-resident is a party plaintiff and himself begins litigation in this State in his own interest. The argument is that such a rule in favor of a non-resident plaintiff might, in some exceptional case, give the non-resident an undue advantage over our own citizens, where the citizen against whom the suit is brought has some claim against the non-resident plaintiff which cannot be availed of as a defense or counterclaim.

We are not prepared to say that in such a case our courts would not take jurisdiction of a non-resident plaintiff, if when the question arises, it is made to appear that it is necessary for the full protection of our citizen against whom the non-resident has brought his action here, but this is not such a

App. Div.]

Fourth Department, March, 1912.

case. We think the general rule is otherwise, and if circumstances made this case an exception to the general rule, it was incumbent upon the plaintiff to present the facts at the Special Term to show the grounds therefor.

No authorities are cited to support plaintiff's claim that a non-resident plaintiff has not the same protection in coming into our State to attend the trial of his own case as is accorded to witnesses in general and non-resident defendants. We find, however, that the question has been passed upon in favor of plaintiff's contention in the following cases: *Bishop v. Fose* (27 Conn. 1); *Baisley v. Baisley* (113 Mo. 544); *Iron Dyke Copper Mining Co. v. Iron Dyke R. R. Co.* (132 Fed. Rep. 208); *Mullen v. Sanborn* (79 Md. 364; 25 L. R. A. 721). And adversely to the plaintiff in these cases: *Tribune Assn. v. Slee-man* (12 Civ. Proc. Rep. 20); *Minnich v. Packard* (85 N. E. Rep. [Ind. Ct. App.] 787); *Matter of Healey* (53 Vt. 694); *Gregg v. Sumner* (21 Ill. App. 110); *Letherby v. Shaver* (73 Mich. 500); *Morrow v. Dudley* (144 Fed. Rep. 441); *Peet v. Fowler* (170 id. 618).

We think, however, the question has been decided adversely to plaintiff in principle in the case of *Matthews v. Tufts* (87 N. Y. 568). In that case the non-resident, who was served with process here, came to attend a meeting of the creditors of a bankrupt "solely as a creditor and witness, to prove certain debts and claims against the estate of said bankrupt, to participate in the choice of assignee, and for no other purpose." Judge RAPALLO, writing for a unanimous court, said: "In *Van Lieuw v. Johnson*, decided March, 1871, and referred to in *Person v. Grier* (66 N. Y. 124), a majority of this court were of opinion that a summons could not be served upon a defendant, a non-resident of the State, while attending a court in this State as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority." In that case a creditor came voluntarily into this State for the purpose of establishing his claim in bankruptcy and participating in the proceeding. It does not appear that he himself instituted the bankruptcy proceeding, but his appearance was

not for the benefit of any party to the proceeding other than himself, nor was it necessary that the bankruptcy court or the other creditors should have the aid of his presence or testimony, as the sole effect of his failure to prove his claim would be to prevent his sharing in the assets. Moreover, he could have made a proof of claim at his home and sent it forward with a power of attorney to authorize the casting of his vote for assignee. He was thus voluntarily in this State to enforce a claim of his own as was the plaintiff in the present case.

The reasons for the rule protecting a non-resident suitor or witness are stated and the cases reviewed in *Parker v. Marco* (136 N. Y. 585) and *Netograph Mfg. Co. v. Scrugham* (197 id. 377). In both these cases, however, the non-resident party was here as a defendant.

We think our courts should protect a non-resident coming into this State to attend upon litigation here, whether as plaintiff or defendant, against being required to engage in other litigation here against his will. Such a rule will aid in the administration of justice and afford a protection which our citizens should receive in other jurisdictions.

We conclude that the order appealed from should be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

MICHAEL CABONI, as Administrator, etc., of EMMANUEL COLETTA, Deceased, Appellant, v. FRED A. GOTTF, Respondent.

Fourth Department, March 27, 1912.

Master and servant — negligence — death by fall of earth — Labor Law construed — assumption of risk — erroneous charge.

Since the amendment to section 202 of the Labor Law, made by chapter 352 of the Laws of 1910, it is error to charge in an action to recover for the death of a laborer, who was killed in a trench by a fall of earth subsequent to a blast, that the jury may find that, if the defendant was negligent in failing to inspect the bank after the explosion to ascertain whether it was safe and the plaintiff continued to work in the trench

App. Div.]Fourth Department, March, 1912.

knowing of the failure to inspect, he assumed the risk and that the defendant would not be liable.

Having made such erroneous charge, it was further error to refuse to charge that, if the jury found that the fall of earth was due to a defect which could have been discovered by reasonable inspection, the death of the deceased was not due to assumed risk.

ROBSON, J., dissented.

APPEAL by the plaintiff, Michael Caboni, as administrator, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Orleans on the 26th day of June, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 22d day of June, 1911, denying the plaintiff's motion for a new trial made upon the minutes.

Plaintiff's intestate was killed while in the employ of the defendant in the work of removing a bank of earth along a trench dug for a sewer in the village of Medina.

Horace O. Lanza and Angelo F. Scalzo, for the appellant.

Clinton B. Gibbs and Layton H. Vogel, for the respondent.

FOOTE, J.:

The jury were instructed that they might find the defendant liable if the foreman was negligent in putting plaintiff's intestate to work in a place of danger, or a place the dangerous character of which might have been discovered by the exercise of reasonable care; also that if the plaintiff's intestate was negligent, contributing to his injuries, there could be no recovery, notwithstanding they found defendant's foreman to have been negligent; also that if the defendant was negligent in that the foreman failed to inspect the bank after the explosion of the dynamite to ascertain whether the bank was still reasonably safe before setting the men to work under it, and plaintiff's intestate knowing that no such inspection had been made, and being aware of and appreciating the danger, continued to work under this overhanging bank, the jury might find that he assumed the risk of personal injury, and that, if they did find that he assumed the risk, plaintiff could not recover.

The amendment made by chapter 352 of the Laws of 1910 to

Fourth Department, March, 1912.

[Vol. 149.]

section 202 of the Labor Law (Consol. Laws, chap. 31; Laws of 1909, chap. 36), which was in effect at the time this accident occurred, provides: "In an action brought to recover damages for personal injury or for death resulting therefrom received after this act takes effect, owing to any cause, including open and visible defects, for which the employer would be liable but for the hitherto available defense of assumption of risk by the employee, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of the danger of personal injury therefrom, shall not be as matter of fact or as matter of law an assumption of the risk of injury therefrom."

The learned trial judge was in error, in view of this amendment to the statute, in instructing the jury that they might find that plaintiff's intestate assumed the risk, and in case they did so find that defendant would not be liable. In view of the charge upon this subject, plaintiff's counsel made a request to charge, as follows: "I ask your Honor to charge the jury that if they find as a fact that the falling of the crust that killed the deceased was due to a defect which could have been discovered by the foreman by the exercise of reasonable and proper care, test or inspection, then and in that case the death of deceased was not due to assumed risk." The court declined to so charge and allowed an exception to plaintiff. We think this exception was well taken. It was the law of the case under this charge that the defendant was liable in case his foreman negligently set plaintiff's intestate to work at the place where he was injured without having used due care to ascertain whether it was safe. The request to charge must be construed in view of the charge as made, and so construed we think it fairly called for a correction of the charge as to assumed risk to conform to the amended statute. The jury has found a verdict in favor of the defendant. There was ample evidence to support the verdict, either upon the ground that defendant's foreman was not negligent or that plaintiff's intestate was negligent, but we are unable to say upon this record that the jury may not have found upon these questions in favor of the plaintiff and based their verdict upon the sole ground that plaintiff's

App. Div.] Fourth Department, March, 1912.

intestate assumed the risk. Hence, the plaintiff may have been prejudiced by the refusal to charge as requested.

The judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred, except ROBSON, J., who dissented.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

ELMER W. KELLEY, Appellant, v. JOHN W. WARD, Respondent.

Fourth Department, March 28, 1912.

Practice — section 768, Code Civil Procedure, construed — amendment of motion papers — amendment of pleading not authorized.

Section 768 of the Code of Civil Procedure, as amended by chapter 768 of the Laws of 1911, providing that a motion shall not be denied for defects in the moving papers which can be cured upon the hearing or before entry of the order, does not permit the court, on a motion to change the place of trial, to allow the defendant to amend his answer. Leave to amend the pleading must be obtained by motion made at Special Term for that express purpose.

APPEAL by the plaintiff, Elmer W. Kelley, from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk of the county of Monroe on the 5th day of January, 1912, permitting the defendant to amend his answer.

John J. McInerney, for the appellant.

Charles D. Newton, for the respondent.

PER CURLAM:

Defendant's motion to change the place of trial for the convenience of witnesses coming on to be heard at Special Term, the justice presiding was of opinion that defendant would not be able to present the defense upon which he relied as disclosed by the motion papers under his answer as it then stood. Accordingly the order appealed from was made, postponing

the hearing of the motion and permitting defendant, if so advised, to serve an amended answer, the court being of opinion that section 768 of the Code of Civil Procedure, as amended by chapter 763 of the Laws of 1911, permitted such practice. The amendment, so far as material, is as follows: "Upon the hearing of a motion relief shall not be denied to any party because of defects or insufficiencies in the moving papers which can be cured upon the hearing or before the entry of the order thereon, but the court or judge shall direct that such defects or insufficiencies be cured or supplied forthwith and shall proceed to hear and consider the motion or may direct the motion to stand over to be heard at a subsequent time or place."

We think this amendment was not intended to authorize an amendment of pleadings to be ordered or authorized at Special Term except upon motion for that express purpose.

The order appealed from should be modified by striking out the provisions permitting defendant to serve an amended answer and substituting a provision giving defendant leave, if so advised, to move at Special Term to amend his answer.

The motion to change the venue may be renewed upon the same papers and additional papers, including the amended answer, if one is made.

The order as so modified should be affirmed, without costs.

All concurred.

Motion to dismiss appeal denied, without costs. Order modified by striking out the provisions permitting defendant to serve an amended answer and substituting a provision giving defendant leave, if so advised, to move at Special Term to amend his answer. The motion to change the venue may be renewed upon the same papers and additional papers, including the amended answer, if one is made.

STEPHEN G. CLARKE, as Executor of and Trustee under the Last Will of JOHN A. BAGLEY, Deceased, Respondent, v. JAMES R. GILMORE, Appellant, Impleaded with KATHARINE C. BAGLEY, as Executrix of and Trustee under the Last Will of JOHN A. BAGLEY, Deceased, Respondent, and JESSICA T. HILDICK, as Trustee under the Last Will of JOHN A. BAGLEY, Deceased, Defendant.

First Department, March 8, 1912.

Equity — suit for an accounting and to recover on a contract — effect of fraudulent concealment upon limitation of action at law — interest — extra allowance.

Plaintiff, as executor of and trustee under a will with his coexecutors and trustees, held certain shares of stock, and having no available funds to protect the value of said stock which was in danger of being destroyed, entered into a contract with the defendant, who agreed after an assignment of the stock to him to institute proceedings to protect its value and, if possible, to realize and recover the value thereof and to pay to the plaintiff a stipulated sum, less the amount of the disbursements. Within three years after the date of the contract the defendant, without instituting legal proceedings of any kind, sold the stock for much more than the sum stipulated in the contract. He deliberately and fraudulently made the trustees believe that the stock had not been sold by him but had become valueless. They did not learn of the sale until more than eight years thereafter.

In a suit in equity for an accounting and to recover under the contract, held, that the cause was properly brought in equity; that the six-year Statute of Limitations was no defense; that plaintiff should recover the sum stated in the contract with interest thereon, compounded yearly, and that an extra allowance may properly be granted to the plaintiff, although the defendant offered no evidence, but application for extra allowance cannot be passed upon until all the issues have been settled.

The concealment and deception on the part of the defendant constituted fraud and, when discovered, gave to the trustees a cause of action which could be enforced in equity for fraudulent concealment.

One cannot, by his own fraudulent act, destroy a cause of action which can be enforced at law, and thereby escape in equity liability to the extent to which the party has been defrauded.

Where one has obtained an advantage by fraud, equity will not permit him to hold it by resorting to the Statute of Limitations.

APPEAL by the defendant, James R. Gilmore, from an interlocutory judgment of the Supreme Court in favor of the plain-

First Department, March, 1912.

[Vol. 149.]

tiff, entered in the office of the clerk of the county of New York on the 3d day of October, 1911, upon the decision of the court rendered after a trial at the New York Special Term.

Charles Blandy, for the appellant.

Ernest G. Stevens, for the respondent Clarke.

McLAUGHLIN, J.:

On the 10th of July, 1899, the plaintiff and the defendants Bagley and Hildick (*nee* Wood), as trustees under the will of John A. Bagley, deceased, held 8,000 shares of the preferred stock of the Reno Oil Company, a Pennsylvania corporation. On that day they entered into a contract with the defendant Gilmore, which reads as follows:

“Memorandum of Agreement made and entered into this 10th day of July, 1899, between James R. Gilmore, of the Borough of Manhattan, City of New York, N. Y., party of the first part, and Katharine C. Bagley, Stephen G. Clarke and Jessica T. Wood, as Executors and Trustees of the last will and testament of John A. Bagley, deceased, parties of the second part.

“WHEREAS the parties of the second part, as Executors aforesaid, are the owners and holders of eight thousand shares of the property preferred stock of the Reno Oil Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and

“WHEREAS the affairs of said company have been so managed that there is danger that the value of the said stock will be wholly destroyed, and

“WHEREAS the parties of the second part have no available funds to institute necessary legal proceedings to protect the value of said stock, and

“WHEREAS the party of the first part has agreed to take an assignment of the said stock and to institute proceedings at his own cost and expense, to protect the value of said stock, and if possible to realize and recover the value thereof, and

“WHEREAS the parties of the second part have duly assigned said eight thousand shares of stock to the party of the first part,

App. Div.]First Department, March, 1912.

"Now, therefore, the party of the first part, in consideration of such assignment, does hereby agree to and with the parties of the second part, that he will institute and prosecute, at his own cost and expense, necessary legal proceedings to protect the value of said stock and to recover the fair value thereof and from and out of any moneys that he may recover, after deducting the amount of money actually disbursed by him, excepting for legal services, to pay over to the parties of the second part, an amount equal to the price paid for said stock by said John A. Bagley, deceased, which price it is hereby stipulated and agreed was \$16,000 less amount of actual disbursements.

"It is Mutually Understood and Agreed that the party of the first part shall not involve the parties of the second part in any expense, whether for legal or other services.

"In Witness Whereof the parties have hereunto set their hands and seals the day and year first above written.

"JAMES R. GILMORE,
"KATHARINE C. BAGLEY,
"Ex. & Trustee.
"STEPHEN G. CLARK,
"Ex. & Trus.
"JESSICA T. WOOD,
"Trustee.

"In the presence of
"F. J. LANCASTER,
"20 Broad Street,
"N. Y. City."

At the time the contract was executed the stock was formally assigned to Gilmore. The certificates, however, were not delivered until some time thereafter, another assignment having, in the meantime, also been delivered. The consideration of both assignments and the delivery of the certificates was the same — the agreement. Gilmore, without instituting legal proceedings of any kind, some time prior to 1902 sold all of the stock, together with from 17,000 to 20,000 other shares and received in payment \$50,000. Prior to that time he had also received \$5,000 as a forfeit on another contract for the sale of

First Department, March, 1912.

He never informed the trustees, or any of them, in 1910, that he had sold the stock and up to that time was ignorant of it. Instead, he "deliberately and fraudulently concealed from * * *" them also, after the sale, according to the finding of the court in 1910, "deliberately and intentionally fraudulently induced the * * * trustees into believing that the stock had not been sold by him but had become and remained the property of the plaintiff." In April, 1910, the plaintiff, having learned of the fact, demanded that Gilmore render an account of his proceedings in relation to the stock. This he refused to do, or to pay over the proceeds derived from the sale. Thereupon the plaintiff brought this action for the purpose of having an accounting. The other trustee refused to join with the plaintiff and were therefore not parties defendant. Gilmore interposed a defense which he set up, among other defenses, (1) an adequate remedy at law; and (2) the Statute of Limitations.

The evidence offered on the part of the plaintiff in the foregoing facts and the court so found. There was no evidence. The court directed a verdict for the relief demanded in the complaint, and held that the plaintiff was entitled to recover the interest thereon, compounded yearly, from Gilmore's actual and proper disbursements under the contract; appointed a referee to take and make disbursements; and awarded an extra allowance to the plaintiff of five per cent on the recovery, or \$2,000. Gilmore appeals from the judgment, asking a reversal upon the grounds (a) that the action was brought in equity; (b) that the cause of action, as alleged, was at the time the action was commenced by the six years' Statute of Limitations; and (c) that the extra allowance was improperly granted. The opinion that this action is properly brought under the six years' Statute of Limitations does

App. Div.]First Department, March, 1912.

apply. The purpose of the agreement was to enhance the value of the stock and effect a sale thereof so that the trustees should receive \$16,000, less actual disbursements connected with the sale. It may be assumed, therefore, that under the agreement Gilmore had the right to sell, and having received more than \$16,000 that the sale was properly made. He then became liable to the trustees and they had a cause of action against him which could have been enforced in an action at law. Had they been informed of the sale, or possibly if he had not represented that a sale had not been made, this cause of action would have been barred by the six years' Statute of Limitations. He not only did not inform them of the sale, but for nearly ten years kept them in ignorance of it by telling them that he had not sold it, that it had become worthless, and that the certificates had been filed with some court in Pennsylvania in connection with litigation. This concealment and deception on his part constituted a fraud and when discovered gave to the trustees a cause of action which could be enforced in equity for fraudulent concealment. One cannot, by his own fraudulent act, destroy a cause of action which can be enforced at law, and thereby escape in equity liability to the extent the party has been defrauded. A court of equity would be of little use if this could be done.

I think the facts in this case bring it within the rule laid down in *Lightfoot v. Davis* (198 N. Y. 261). There, the plaintiff, in 1875, owned certain school bonds, which together with the memorandum with reference to same, were stolen from him by his father-in-law. He had originally bought the bonds through his father-in-law, who, when notified of the loss, said he would "try and notify the districts of the loss and stop payment." The bonds matured a few years later and the interest, as it accrued, and the principal were collected by the father-in-law. Upon his death, which occurred in 1899, there was found among his papers the memorandum with reference to the bonds, and an examination of his books showed he had collected the interest and principal. Upon discovery of these facts the plaintiff brought an action against the administrator with the will annexed of his father-in-law, asking judgment

that the defendant "account and pay over to him the amount of said bonds and the income thereof, if it can be traced, and if it cannot be traced, that he may have judgment against" the defendant as administrator for the sum of \$16,000. The answer interposed set up, among other defenses, the six and ten-year Statutes of Limitations. Plaintiff had a recovery, which on appeal was affirmed by the Court of Appeals. Chief Judge CULLEN, who delivered the opinion, after reviewing authorities at length, said: "In cases like the one before us there are two distinct elements of fraud—1st, the original larceny; 2nd, the subsequent concealment of the stolen property and of its sale and the receipt of its proceeds. Assuming (but only for the argument) that under the first no bill in equity could be maintained, I think the second affords a good ground for the interposition of equity, and, as already stated, though the plaintiff failed to identify in the estate of the deceased the proceeds of his bonds, he was still entitled to what would be a personal judgment were the original wrongdoer still living, for in equity it is the general rule 'that the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial.'"

In the present case Gilmore became rightfully possessed of the stock and of the proceeds of the sale. In this respect this case is distinguishable from the *Lightfoot* case, but as to his concealment and his receipt of the proceeds, it is precisely like it. There the thief concealed the fact that he had sold the bonds and his act in doing that was no more reprehensible than was Gilmore's in stating to the trustees that the stock had not been sold. If the equitable powers of the court could be resorted to in the one case to make reparation for the damage sustained it can be equally so in the other. In this respect I see no distinction between the two cases. (See, also, *Newton v. Porter*, 69 N. Y. 133; *American Sugar Refining Co. v. Fancher*, 145 id. 552; *Bosworth v. Allen*, 168 id. 157.)

I think the action was properly brought in equity under the facts of this case to prevent the defendant from resorting to the Statute of Limitations. Where one has obtained an advantage by fraud, equity will not permit him to hold it by resorting to the Statute of Limitations. (Pom. Eq. Juris. [3d ed.] § 917;

App. Div.]First Department, March, 1912.

Clark v. Augustine, 62 N. J. Eq. 689; *Molms v. Pabst Brewing Co.*, 93 Wis. 153; *Lieberman v. First Nat. Bank*, 2 Pa. (Del.) 416; 48 L. R. A. 514, and authorities cited.)

In 25 Cyc. 1016 the rule is tersely stated as follows: "The doctrine of equitable estoppel may in a proper case be invoked to prevent defendant from relying upon the Statute of Limitations, it being laid down as a general principle that when a defendant electing to set up the Statute of Limitations previously by deception or any violation of duty toward plaintiff has caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which equity will not allow him to hold."

When the stock was sold Gilmore was legally obligated to inform the trustees by paying over the proceeds. He not only failed to perform this obligation, but "deliberately and intentionally fraudulently deceived the * * * trustees into believing that the said stock had not been sold." His act was as reprehensible as it would have been had he in the first instance stolen the proceeds of the sale. Having committed such acts he cannot shield himself from liability by resorting to the Statute of Limitations.

Price v. Holman (135 N. Y. 124) is an authority for requiring, in a proper case, a defendant to pay compound interest. It would be somewhat difficult to find a case where it was more properly imposed than the present.

It would also seem to be a proper case for an extra allowance of costs under section 3253 of the Code of Civil Procedure, notwithstanding the fact that the defendants offered no evidence at the trial. (*Metropolitan Life Ins. Co. v. Standard National Bank*, 44 App. Div. 319.) But I do not understand that the question of an extra allowance can be passed upon until all of the issues in the action have been settled. Here an issue remains, viz., the amount of Gilmore's disbursements, as to which a reference has been ordered; in other words, whether or not an extra allowance will be granted will be determined at the time of the entry of final judgment.

My conclusion, therefore, is that the judgment appealed from should be modified by striking out the provision for an extra allowance, without prejudice to an application for same when

First Department, March, 1912.

[Vol. 149.]

final judgment may be entered, and as thus modified affirmed, with costs to the plaintiff, respondent.

CLARKE, LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Judgment modified as directed in opinion, and as modified affirmed, with costs to plaintiff, respondent. Order to be settled on notice.

AUGUSTUS T. POST, Appellant, v. EMMA C. POST,
Respondent.

First Department, March 8, 1912.

Husband and wife — action to annul marriage — former husband living — comity — decree of foreign State dissolving marriage — judgment — force and effect of erroneous New York decree — conflict of judgments.

In an action to annul a marriage on the ground that at the time of the contract the defendant had another husband, it appeared that in 1871 the defendant was married in Louisiana to K.; that thereafter they moved to Texas, and in 1878 defendant for sufficient cause left her husband and established her domicile in Louisiana; that in 1883 K., who had continued to reside in Texas, procured in that State a dissolution of the marriage on the ground of abandonment after personal service upon the defendant in Louisiana and her failure to appear. In 1895 defendant married H. in New York and subsequently brought an action against him for separation on the ground of abandonment, in which H. appeared and asked as a counterclaim that the marriage be annulled on the ground that plaintiff had never been legally divorced from K. The counterclaim was sustained and the marriage was annulled (following *Atherton v. Atherton*, 155 N. Y. 129), neither party appealing. Subsequently plaintiff and defendant were married in this State. K. and H. were both living when the marriage was entered into, and in 1907 this action was commenced, the complaint alleging both the former marriages of the defendant and that her marriage with K. was in full force and effect at the time she married the plaintiff.

Held, that the complaint was properly dismissed on the merits, as the defendant was free to contract her marriage with the plaintiff;

That the decree of the State of Texas dissolving defendant's marriage to K. must be given full credit here under the decision of the United States Supreme Court in *Atherton v. Atherton*, since Texas was the matrimonial domicile and defendant received not only reasonable but actual notice of the action, as required by the Texas statutes;

That the judgment entered in New York State dissolving defendant's marriage to H. on the ground that under the New York Court of

App. Div.] First Department, March, 1912.

Appeals decision in the *Atherton* case the Texas decree dissolving her marriage with K. was invalid is binding, no appeal having been taken, and conclusively annulled defendant's marriage with H., although it is erroneous under the subsequent United States Supreme Court decision in the *Atherton* case;

That the New York judgment, though erroneous, could only be set aside in a proceeding for that purpose;

That *Atherton v. Atherton* (181 U. S. 155) is not overruled by *Haddock v. Haddock* (201 id. 562), but they are distinguishable, the latter holding that a foreign decree dissolving a marriage obtained without personal service or appearance by the defendant is only valid if obtained in the State of the matrimonial domicile.

APPEAL by the plaintiff, Augustus T. Post, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 23d day of February, 1911, upon the decision of the court rendered after a trial at the New York Special Term dismissing the complaint upon the merits.

Charles W. Coleman, for the appellant.

John J. Kirby, for the respondent.

MC LAUGHLIN, J.:

Action to annul a marriage on the ground that at the time the contract was entered into the defendant had another husband. There is little or no dispute between the parties as to the material facts. It appears that on January 5, 1871, the defendant was married in the State of Louisiana to one John S. Keaghey; that after the marriage they resided in Louisiana until November, 1875, when they moved to Galveston, Tex., and there continued to live together as husband and wife until some time in May, 1878, when, for sufficient cause, the defendant left her husband and went to New Orleans, La.; that when she left she did not intend to and never has returned to Keaghey; that in February, 1882, Keaghey, who had continued to reside in Texas, commenced an action against her in that State for a dissolution of the marriage on the ground of abandonment; that, pursuant to the laws of Texas, she was personally served in New Orleans with a notice to appear in the action, and with a certified copy of the petition, but she did not appear, and a decree was thereafter entered upon her

First Department, March, 1912.

[Vol. 149.]

default dissolving the marriage; that in August, 1895, she married one Holliday, in the State of New York, where they resided for some time; that subsequently she commenced an action in the Supreme Court of that State for a separation on the ground of abandonment; that he appeared in the action, and, as a counterclaim, asked that the marriage be annulled on the ground that she never had been legally divorced from Keaghey; that this contention was sustained by the court, and a judgment entered on December 1, 1898, annulling the marriage; that subsequently the plaintiff and defendant were married in the State of New York, where they then and have since resided; that Keaghey and Holliday were both living when this marriage was entered into; that the plaintiff and defendant lived together as husband and wife until 1907, when this action was commenced, the complaint alleging both the former marriages of the defendant and that her marriage with Keaghey was in full force and effect at the time she married the plaintiff; and the judgment demanded was that the marriage be declared void.

At the conclusion of the trial—the foregoing facts having been established—the court dismissed the complaint upon the merits, holding that the defendant was legally free to marry at the time of her marriage with the plaintiff. From the judgment entered to this effect the plaintiff appeals.

The principal question presented by the appeal is the validity of the Texas decree dissolving defendant's marriage with Keaghey. The appellant's contention is that this decree will not be recognized as valid in the State of New York because at the time the suit was brought the defendant had acquired a separate domicile in Louisiana; she was not personally served with process in Texas; did not appear in the suit; and for that reason the Texas court did not acquire jurisdiction over her. At the trial evidence was offered to the effect that defendant, at the time the Keaghey action was commenced, considered Texas as her permanent home or domicile, but this question seems to me to be immaterial because, if it be conceded that she never intended to return to Texas after leaving Keaghey, I am of the opinion that the validity of the Texas decree is, nevertheless, conclusively established by the

App. Div.]

First Department, March, 1912.

decision of the United States Supreme Court in the case of *Atherton v. Atherton* (181 U. S. 155), in which the essential facts were quite similar to these. In that case the parties were married in New York, but moved immediately to Kentucky, where they lived as husband and wife for some three years. The wife then left her husband owing to his cruel and abusive treatment without fault on her part, and returned to her former home in New York. The husband remained in Kentucky, and there brought an action for divorce on the ground of desertion. Notice of the commencement of the action was sent by mail to the wife in New York, in accordance with the statutes of Kentucky, but she did not appear, and a decree was entered dissolving the marriage. Subsequently she brought an action in the State of New York for a separation, in which the husband appeared and set up the Kentucky decree as a bar. The court refused to recognize the validity of this decree, it having been rendered on constructive service without jurisdiction over the person of the wife, and granted the plaintiff a judgment as prayed for in her complaint. This judgment was affirmed by the Court of Appeals (155 N. Y. 129), but reversed by the Supreme Court of the United States (181 U. S. 155). In reversing the judgment the court said: "In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky * * *. We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky and were actually made to give the wife actual notice of the suit in Kentucky as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky or had voluntarily appeared in the suit. Binding her to that full extent it established beyond contradiction that she had abandoned her husband and precludes her from asserting that she left him on account of his cruel treatment."

This is precisely the situation in the case at bar so far as it

First Department, March, 1912.

[Vol. 1]

relates to the Texas decree. At the time the defendant separated from Keaghey the matrimonial domicile of the parties was, and for some years prior thereto had been, the State of Texas. It continued to be the domicile of the husband, and no claim is made that service was not made upon the defendant in the manner required by the Texas statutes, or that these requirements were not such as to give her reasonable notice; on the contrary, it is established beyond dispute that she did have actual notice of the commencement of the suit. This being so, the court is bound to hold that the Texas decree was valid and binding upon the defendant so that she was legally free from her marriage with Keaghey at the time she married the plaintiff.

There is nothing in the case of *Haddock v. Haddock* (29 U. S. 562) which in anywise weakens this conclusion. Four of the justices were of the opinion that under the facts in that case the foreign divorce was entitled to recognition, and the majority of the court specifically reasserted the rule laid down in *Atherton v. Atherton*. The facts in the *Haddock* case were that the parties were married in New York, but immediately separated, and the husband subsequently acquired a domicile in Connecticut, where he obtained a divorce on constructive service only. Subsequently the wife brought an action for separation in the State of New York, where she had continued to reside, and it was held that the Connecticut decree was not a bar to her action. The majority of the court placed its decision upon the ground that Connecticut was never the actual or constructive matrimonial domicile, since the husband had deserted the wife in New York, and she there continued to be domiciled, for which reason the Connecticut court did not acquire jurisdiction over the wife.

It is urged that the *Atherton* case was overruled by the *Haddock* case, but this clearly is not so, and when properly considered it seems to me they are not at all in conflict.

It is settled that a wife may acquire a domicile separate from her husband where his conduct justifies her in leaving him or where he deserts her without just cause. (*Gray v. Gray*, 14 N. Y. 354; *Hunt v. Hunt*, 72 id. 217; *Cheever v. Wilson*, 9 Wall. 108.) In cases where the defendant is not personally

App. Div.]

First Department, March, 1912.

served within the State and does not appear in the action, the jurisdiction of the court over the person of the defendant depends upon whether or not the defendant is domiciled within the State. It logically follows, therefore, that where a husband and wife have separated and he sues for divorce in the State where he resides without personal service and without her appearing in the action, then the question whether the court obtains jurisdiction or not depends upon whether she has acquired a separate domicile, that is, whether she was or was not justified in separating from him. That in turn presents the further question whether without personal service upon her or her voluntary appearance the courts of the State of his domicile can make a determination that she was not justified in leaving him, which will be binding upon her and entitled to recognition in all the other States under the full faith and credit clause of the Federal Constitution. (See U. S. Const. art. 4, § 1.) That question was settled by the Supreme Court of the United States (*Atherton v. Atherton, supra*) when it held that where the husband remained in the State of the matrimonial domicile the courts of that State had the power to determine under reasonable requirements as to notice whether or not her absence was justifiable and that such determination is entitled to full faith and credit in other States, while, if the husband goes into another State, not the matrimonial domicile, the determination of the courts of such other State is not entitled to full faith and credit unless the wife is personally served within the State or appears in the action. (*Haddock v. Haddock, supra.*)

In *Townsend v. Van Buskirk* (22 App. Div. 441) CULLEN, J., said that "an action for divorce is to a certain extent an action in *rem*," the *res* being the relation of the parties. This *res* is undoubtedly located at the matrimonial domicile and there continues until destroyed by death or judicial decree. However this may be, it is settled that where a wife leaves the matrimonial domicile, even though justified in doing so, a decree of divorce properly granted by the courts of that State at the suit of the husband, who remains there, must be recognized as binding in all other States. (*Atherton v. Atherton, supra*; *Hammond v. Hammond*, 103 App. Div. 437.)

First Department, March, 1912.

[Vol.

If the foregoing views be correct, then it follows that Texas decree is binding upon the courts of this State and the defendant at the time she married the plaintiff could legally do so notwithstanding her prior marriage to Keaghey.

The remaining question is whether her marriage to Holliday was legally dissolved. That it was seems to me to be established beyond question by the judgment of the Supreme Court of this State. That judgment was upon the ground that she was then the legal wife of Keaghey and so recites. In thus holding that the Texas decree was invalid, the learned justice before whom the action was tried followed, as he was bound to do, the decision of the Court of Appeals in *Atherton v. Atherton* (1 N. Y. 129), which was handed down only a short time before the trial. The decision of the Court of Appeals was reversed by the Supreme Court of the United States, and in view of such reversal it must now be conceded that the judgment was erroneous and the defendant's marriage with Holliday should not have been annulled. The judgment, however, was not appealed from. It still remains and is just as binding now as the day it was rendered. It conclusively establishes the annulment of her marriage with Holliday. In this connection it is urged by the appellant that if the defendant wishes to rely upon this judgment as establishing the annulment of her marriage with Holliday, she can only do so by accepting it as an adjudication equally binding upon her that she had never been lawfully divorced from Keaghey. This presents an interesting question, but one which it seems to me, in view of the facts, unnecessary to consider at length. The plaintiff brings this action to annul his marriage with the defendant on the ground that she had previously been twice married and had never been lawfully divorced from one of her former husbands. She had the right, in answer to his claim, to introduce in evidence the Texas decree for the purpose of showing that she had been judicially freed from Keaghey; and, in order to show that she was no longer married to Holliday, she certainly had the right to introduce the judgment rendered in this State. No one could reasonably claim that she was in any way precluded from introducing both judgments in evidence; and once they were received in evidence, then their legal effect became

App. Div.]First Department, March, 1912.

matter of law for the determination of the court. There is no conceivable theory upon which this court can disregard, in view of the decision of the Supreme Court of the United States in *Atherton v. Atherton*, the effect of the Texas decree. It must be given full faith and credit under that decision, and is conclusive that the defendant was no longer the wife of Keaghey. The Holliday judgment is equally conclusive that she was no longer the wife of Holliday, and, so long as that judgment stands, neither the appellant, this court, nor any one else, can disregard it. The Holliday judgment is erroneous and the defendant's position is, to say the least, unique, and it may be, if by her act she could alter the effect of the decree, there would be some force in the appellant's contention. But she cannot do this. That judgment can only be set aside in a direct proceeding brought for that purpose, and this defendant, the only party to it now before the court, not only does not seek to set it aside, but on the contrary relies upon it. The fact that she does rely upon this judgment cannot reinstate her as the wife of Keaghey, or lessen, to the slightest extent, the effect of the Texas decree.

My conclusion, therefore, is that at the time of her marriage with the plaintiff she was free to enter into the marriage contract, and the judgment appealed from should be affirmed, with costs.

INGRAHAM, P. J., LAUGHLIN, CLARKE and MILLER, JJ., concurred.

Judgment affirmed, with costs.

JEAN BENTON TODD, Appellant, v. FREDERICK B. PRATT,
Respondent.

First Department, March 8, 1912.

Statute of Frauds — action for breach of oral contract to convey lands in consideration of discontinuance of action — equity — part performance of oral contract.

The plaintiff made a contract to purchase three and one-half acres of a tract of land upon which there was a prior mortgage. She brought suit to enforce specific performance of her contract and filed a *lis*

pendens. The mortgagee sued to foreclose the mortgage, making the plaintiff a party defendant. To hasten the foreclosure the defendant requested the plaintiff to discontinue her action and cancel the *lis pendens*, which she did in consideration of the defendant's oral promise, upon his purchase of the property at the foreclosure sale, to convey to the plaintiff the land which she had contracted to purchase, and to save her harmless from loss by reason of the discontinuance of her suit for specific performance. The defendant purchased the land at the foreclosure sale and sold the three and one-half acres to other parties, and plaintiff brings this action to recover damages for breach of contract, alleging injury to other property to which she intended to annex the three and one-half acres. The defendant pleads the Statute of Frauds.

Held, that the plaintiff's relation to the mortgage was that of a subsequent vendee and, therefore, she did not lose anything by the discontinuance of her suit and the canceling of the *lis pendens*;

That the promise to convey the three and one-half acres, when purchased, was void for not being in writing; that there is no element in the case to take the agreement out of the Statute of Frauds; the act of part performance was the discontinuance of an action which it was futile to prosecute;

That there was no confidential relation between the parties, for an abuse of which relief may be obtained in equity.

The acts of part performance which will take a case out of the Statute of Frauds must be unequivocally referable to the agreement of which they are a part execution.

MC LAUGHLIN, J., dissented, with opinion.

APPEAL by the plaintiff, Jean Benton Todd, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 18th day of May, 1911, upon the pleadings, and also from an order entered in said clerk's office on the 17th day of May, 1911, directing the entry of the said judgment.

F. J. Gardenhire, for the appellant.

W. Cleveland Runyon, for the respondent.

MILLER, J.:

In a nutshell the case is this: The plaintiff made a contract to purchase three and one-half acres of a tract of land upon which there was a prior mortgage to secure bonds owned by the defendant. She brought an action to enforce specific performance of her contract and filed a *lis pendens*. The trustee brought an action to foreclose the mortgage, making the plaintiff a party defendant. To hasten the foreclosure proceedings

the defendant requested the plaintiff to discontinue her action and cancel the *lis pendens*, and the plaintiff says that she did that in consideration of certain promises made by the defendant, which were evidently so indefinite in the plaintiff's mind that in her complaint she expressed them in vague fashion as follows: "That he, Pratt, when he became possessed of said property would do with said plaintiff, Jean Benton Todd, upon his part, everything that the officers and agents of the Indian Kettles Park Association, corporation, had agreed to do with her, with reference to said tract of approximately three and a half acres of land, which was that when Pratt should have the title to said property he would carry out with said plaintiff the contract in writing existing between this plaintiff, Jean Benton Todd, and said Indian Kettles Park Association, to wit, to make title in said plaintiff of said approximately three and a half acres of land on the lake front of Lake George, as aforesaid, which contract was the subject-matter of plaintiff's suit so mentioned in paragraph 1 herein; and said Pratt at said time contracted and agreed that when he should have acquired the title to said Indian Kettles Park Association property aforesaid, he would protect in the plaintiff herein, Jean Benton Todd, her interest in said approximately three and one-half acres of lake front land as fully as she had an interest therein, and as fully as it could be protected by said action which the plaintiff had brought, and which said Pratt desired discontinued, contracting and agreeing with said Jean Benton Todd that if she would dismiss her said action, as aforesaid, and withdraw her said notice of *lis pendens*, that he, the said Pratt, would see to it that she, the said Jean Benton Todd, should lose nothing of value by reason of such action on her part." The defendant purchased the tract at the foreclosure sale and sold the three and one-half acres, which the plaintiff had contracted to purchase, to other parties, and the plaintiff brings this action to recover damages for breach of contract, the particular damage alleged in the complaint being, not the loss of her bargain, but injury to other property to which she intended to annex the three and one-half acres. The defendant pleads the Statute of Frauds. In her reply the plaintiff admits that the contract sued on was not in writing, and so the question is presented on

First Department, March, 1912.

[Vol.

this motion for judgment on the pleadings whether the defendant can successfully invoke the Statute of Frauds as a defense (*Seamans v. Barentsen*, 180 N. Y. 333.)

To reduce the vague averments of the complaint to precise terms and to state them most favorably to the plaintiff, the defendant's promise was: (1) Upon the purchase at the foreclosure sale, to convey to the plaintiff the three and one-half acres which she had contracted to purchase; (2) to save her harmless from loss by reason of the discontinuance of her action for specific performance. Considering those promises in the inverse order, it is plain that the complaint fails to allege that the plaintiff suffered any loss. Her contract was subject to the prior mortgage and, of course, was extinguished by the foreclosure of that mortgage. By her consent the foreclosure action was expedited. Thereby she enabled that to be done speedily which, in any event, would have ultimately been accomplished. She alleged in her complaint that the corporation with which she contracted "had full authority to contract for the sale of said three and a half acres by reason of provisions relating thereto in the trust deed, or instrument expressive of said lien;" but, obviously, that is a mere conclusion of law. The provisions of the trust deed or mortgage referred to are nowhere stated and, of course, it is impossible to determine their legal effect without knowing what they were. According to her complaint the plaintiff's relation to the mortgage was that of a subsequent vendee. She, therefore, fails to show that she lost anything by the discontinuance of her action and the canceling of the *lis pendens* filed therein.

Plainly, the promise to convey the three and one-half acres when purchased, was void for not being in writing, and the question arises whether there is any element in the case to take it out of the rule of the Statute of Frauds. All of the cases cited by my brother McLAUGHLIN, except *Riggles v. Ernest* (154 U. S. 244), involved the element of abuse of a position of confidence and trust, the familiar case for treating the wrongdoer as a trustee *ex maleficio*. It certainly cannot be claimed that there was any confidential relation between the parties in this case or that the defendant undertook as agent for the plaintiff to purchase at the sale and thereby to induce

App. Div.]

First Department, March, 1912.

her to stay away or to refrain from bidding, as was the case in *Ryan v. Dox* (34 N. Y. 307). While equity is quick to circumvent that species of fraud which consists in the abuse of a relation of trust and confidence, it will not presume such a relation to have existed for the sake of exercising its extraordinary remedial jurisdiction.

There being, then, no question of the abuse of a confidential relation, the plaintiff must succeed, if at all, on the theory of part performance. It is undoubtedly the rule that, where one party, relying upon a promise of the other, has so far performed that he cannot be restored to his former position and will suffer damage, the breach of the promise is treated as a species of fraud from the consequences of which the courts will relieve the party who has thus wholly or partly performed. But the difficulty in applying that rule to this case is that the plaintiff has suffered no damage. She merely made it possible for a judgment foreclosing her interest to be entered sooner than it otherwise could have been entered. Merely saying that the courts will not suffer the Statute of Frauds to be made an instrument of fraud determines nothing. It must always be remembered that the breach of a void agreement is not a fraud in law. (*Levy v. Brush*, 45 N. Y. 589; *Wheeler v. Reynolds*, 66 id. 227.) The acts of part performance which will take a case out of the Statute of Frauds must be unequivocally referable to the agreement of which they are a part execution. (*Wheeler v. Reynolds*, *supra*; *Cronkhite v. Cronkhite*, 94 N. Y. 323.) The act of part performance in this case was the discontinuance of an action which it was futile to prosecute. For aught that appears, the plaintiff, if well advised, would have discontinued her action anyhow, when the foreclosure action was begun. How can it be said, then, that her act in its object and design plainly refers to the alleged agreement? She must fail, then, on the theory of part performance both because she has suffered no damage and because the act of part performance relied upon is not unequivocally referable to the alleged void agreement.

The judgment and order should be affirmed, with costs.

INGRAHAM, P. J., LAUGHLIN and DOWLING, JJ., concurred;
McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

In determining whether the court erred in directing judgment on the pleadings dismissing the complaint every material fact alleged therein, as well as all inferences that can reasonably and fairly be drawn therefrom, must be accepted as true. If the facts stated in the complaint show that the plaintiff is entitled to any relief, either legal or equitable (*Wetmore v. Porter*, 92 N. Y. 76; *Hotel Register Co. v. Osborne*, 84 App. Div. 307; *Clark v. Levy*, 130 id. 389), then the judgment and order appealed from should be reversed.

Turning to the complaint it will be found that the plaintiff alleges, in substance, that the Indian Kettles Park Association, a domestic corporation, owned a tract of land on the shores of Lake George, three and one-half acres of which it had contracted, in writing, to sell to the plaintiff; that prior to the time this contract was entered into the Indian Kettles Park Association had executed to the Standard Trust Company of New York a mortgage upon the entire tract to secure the payment of an issue of bonds, such mortgage, however, containing provisions which enabled the association to contract with the plaintiff; that the plaintiff having performed said contract upon her part, commenced an action in the Supreme Court of the State of New York to compel the association to carry out the contract on its part by giving her a deed, and in that action the Standard Trust Company was a party defendant; that she had also filed in the proper clerk's office a notice of the pendency of the action; that at or about the same time her action was commenced the Standard Trust Company commenced an action in the Supreme Court to foreclose its mortgage and she was made a defendant; that the defendant in this action owned substantially all of the bonds, payment of which the mortgage was given to secure, and for that reason desired the foreclosure action should be speedily terminated by a judgment of foreclosure and sale, which could not take place so as to give good title to the land claimed by this plaintiff until after her action had been disposed of; that to obviate the delay he entered into an oral agreement with her that if she would discontinue her action and cancel the *lis pendens* he would, at the foreclosure sale, purchase the land covered by the mortgage and then carry

App. Div.]

First Department, March, 1912.

out the contract which the association had made with her by conveying the three and one-half acres therein mentioned; that he would protect her interest as fully as it could be protected in such action, and if she would do as he requested he would see to it that she "should lose nothing of value by reason of such action on her part;" that the plaintiff fully performed this agreement on her part, and thereupon the foreclosure action proceeded to a judgment under which a sale took place, at which this defendant became the purchaser of the entire tract; that he then refused to carry out his agreement with the plaintiff and put it out of his power to perform by conveying the three and one-half acres to another party. The complaint further alleges that the plaintiff owns land adjacent to the three and one-half acres, upon which is a valuable residence; that the three and one-half acres lie between her property and the shores of Lake George, is the only convenient means of access to the lake, and for that reason would add materially to the value of her property by giving her a large frontage on the lake; that defendant's failure to carry out his agreement has caused her damage to the amount of \$20,000, for which sum judgment is demanded.

But it is said, notwithstanding all of the foregoing facts are admitted to be true, nevertheless the court is powerless to aid the plaintiff; in other words, because her contract with the defendant was not in writing, the Statute of Frauds is a bar to a recovery upon her part. I cannot concur in this view. The statute was designed to prevent frauds not to perpetrate them. It was settled nearly fifty years ago that the courts would not permit a party to make a fraudulent use of the Statute of Frauds (*Ryan v. Dox*, 34 N. Y. 307), and since that time at least the courts have not hesitated, in any case where it clearly appeared that a party was seeking to shield himself behind the statute for the purpose of perpetrating a fraud upon another, thereby causing him damage, to interfere and prevent such use. (*Canda v. Totten*, 157 N. Y. 281; *Wood v. Rabe*, 96 id. 414; *Congregation Kehal Adath v. Universal B. & C. Co.*, 134 App. Div. 368; *Gallagher v. Gallagher*, 135 id. 457; affd., 202 N. Y. 572.) I understand the rule to be that

First Department, March, 1912.

[Vol. 149.]

if the parol agreement be clearly and satisfactorily proven, and one party, relying upon it and the promise of the other to perform on his part, has either partially or fully performed, and by reason thereof cannot be restored to his former position, and will suffer damage, the other party will be required to perform or respond in damages. (*Riggles v. Erney*, 154 U. S. 244.)

Here, the plaintiff has fully performed. She discontinued her action against the Indian Kettles Park Association and thereby lost whatever right she had to enforce her contract, either against it or the trust company. The value of such contract was thereby destroyed. The discontinuance of the action and the canceling of the *lis pendens* was a good and sufficient consideration for the defendant's agreement, and if able to do so he should be required to specifically perform. This, however, according to the allegations of the complaint, he is unable to do by reason of his conveyance of the land in question to another party. Having put it out of his power to perform by conveying the three and one-half acres to her, he should, in lieu thereof, pay the damages she has sustained by reason of his failure.

For these reasons I am unable to concur in the prevailing opinion, and vote to reverse the judgment and order appealed from.

Judgment and order affirmed, with costs.

EMANUEL BARUCH, Appellant, *v.* GEORGE W. YOUNG,
Respondent.

First Department, March 8, 1912.

Pleading — action for an accounting — motion to compel plaintiff to separately state and number causes of action — to make complaint more definite and certain — to strike out irrelevant matter.

Where the complaint, in an action for an accounting, contains, in addition to allegations appropriate to such an action, averments respecting breaches of agreement to indemnify and respecting alleged conversions relating to the acts of the defendant as agent and trustee of the plaintiff and, therefore, relevant to the single cause of action for an account-

App. Div.] First Department, March, 1912.

ing, the plaintiff should not be directed to separately state and number the causes of action.

It seems, that where an application is made to make a complaint more definite and certain by stating a mass of details, which might more properly be obtained by a motion for a bill of particulars, the court is not called upon to sort out these matters which may properly be the subject of the motion, unless it appears to be necessary to protect or preserve a substantial right.

Motions to strike out irrelevant allegations are not favored and are granted only when it is evident that, if denied, the moving party will be prejudiced, and denied unless it is plain that the adverse party will not be harmed.

APPEAL by the plaintiff, Emanuel Baruch, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of December, 1911.

Max D. Steuer, for the appellant.

John C. Tomlinson, for the respondent.

MILLER, J.:

The order appealed from (1) requires the plaintiff to separately state and number causes of action; a, one in equity for an accounting; b, one at law for breach of guaranty or indemnity; c, one or more for conversion; (2) requires the plaintiff to make the complaint more definite and certain by stating a mass of details; (3) strikes out of the complaint certain matter as irrelevant, redundant and scandalous.

Under the first head the plaintiff says that he has attempted to state but one cause of action, *i. e.*, an action for accounting. In brief the plaintiff alleges that, in consideration of free medical attention and advice the defendant agreed to act as trustee and agent for the plaintiff in the management of the plaintiff's financial affairs, to take charge of the plaintiff's business affairs, to buy and sell stocks and other securities, and to indemnify the plaintiff against loss in such transactions. The complaint then alleges various transactions conducted by the defendant pursuant to that arrangement, the opening of accounts with different brokers, the delivery of securities and money to them and to the defendant, the making of profits in some transactions, appropriated by the defendant, and the incur-

First Department, March, 1912.

[Vol. 14]

ring of losses in others from which the defendant had failed to protect the plaintiff according to his agreement, the use of plaintiff's property by the defendant in speculative purchases and sales on his own account, the making of secret profits by the defendant not accounted for, the loading of plaintiff's account with transactions showing loss, and the secret appropriation by the defendant of those showing profit.

While the complaint contains averments appropriate to each of the three causes of action which the plaintiff is now directed to separately state and number, it is not plain that he has attempted to state more than a single cause of action for an accounting. That is his prayer for relief. The averments respecting breaches of the agreement to indemnify and respecting alleged conversions relate to the acts of the defendant as agent and trustee, and are, therefore, relevant to the single cause of action for an accounting. Under such circumstances the motion to require causes of action to be separately stated and numbered should have been denied. (*Pope v. Kelly*, 30 App. Div. 253; *Weed v. First National Bank*, 106 id. 285.)

Under the second head, the plaintiff has been required to state a mass of details, concerning names, dates and circumstances which might be proper to narrow the issues and prevent surprise upon the trial, but which do not form a material or essential part of the cause of action. It would unduly extend this opinion and serve no useful purpose to enumerate them. Suffice it to say that in the main the details asked for should be obtained by a motion for a bill of particulars. (*Dumar v. Witherbee, Sherman & Co.*, 88 App. Div. 181; *Harrington v. Stillman*, 120 id. 659.) It may be possible that out of the great mass of details asked for a very few may constitute such a material part of the cause of action as that in respect to them the complaint should be made more definite and certain. But when an application is made in that fashion, I do not think the court is called upon to sort out those matters which might properly have been the subject of the motion, at least unless that labor appears to be necessary to protect or preserve a substantial right.

Under the third head, some of the matter stricken out is plainly irrelevant, and some as plainly relevant, although

App. Div.] First Department, March, 1912.

the relevant matter stricken out may not have been essential to the statement of the cause of action. Motions to strike out are not favored and are granted only when it is evident that, if denied, the moving party will be prejudiced, and denied unless it is plain that the adverse party will not be harmed. (*Indelli v. Lesser*, 130 App. Div. 548, and cases cited.) It is quite true that the complaint is very far from being a model, but it is idle on motions of this character to attempt to make a scientific pleading out of such a complaint as the one in this record. It is impossible to discover any relevancy of the 12th, 16th and 17th paragraphs of the amended complaint, and these should be stricken out.

The order should be reversed and the motion granted to the extent only of striking out the 12th, 16th and 17th paragraphs of the amended complaint, without costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, without costs, and motion granted to the extent stated in opinion.

RICHARD B. DINEEN, Appellant, *v.* "GEORGE" MAY and "ALBERT" JEKYLL, Doing Business under the Firm Name of MAY & JEKYLL (Names "GEORGE" and "ALBERT" Being Fictitious, Defendants' Christian Names Being Unknown to Plaintiff), Defendants.

ARTHUR B. JEKYLL, Respondent.

First Department, March 8, 1912.

Master and servant—action for wrongful discharge—contract construed—evidence on motion for judgment on pleadings.

A contract of employment contained the following provision: "you [meaning the plaintiff] are to be in all respects subject to such orders as from time to time you may receive from your superiors and to dismissal at any time for incompetence or whenever your dismissal shall in the opinion of the Contractors be for the best interests of the Contractors or the Railway Company. The decision of the said Contractors as to the occasion for any such dismissal shall be final."

First Department, March, 1912.

[Vol.

In an action for wrongful discharge from employment, held, that the contract gave the defendant the absolute right to discharge the plaintiff with or without reason.

On a motion by defendant for judgment on the pleadings before trial court may consider the plaintiff's bill of particulars and whatever may properly be considered on a motion for judgment at the opening of trial.

APPEAL by the plaintiff, Richard B. Dineen, from an order of the Supreme Court, made at the New York Special Term a. entered in the office of the clerk of the county of New York on the 13th day of October, 1911, granting the defendants' motion for judgment on the pleadings, and also from a judgment entered in said clerk's office on the 19th day of October, 1911, pursuant to said order.

Herbert D. Cohen, for the appellant.

George H. Savage, for the respondent.

MILLER, J.:

This is an action for wrongful discharge from employment. The complaint alleged that the contract of employment was in writing. A copy of said contract was annexed to the answer. The plaintiff served a bill of particulars in which he stated that the contract for breach of which the suit was brought was the contract, a copy of which was annexed to the answer. Motion was made for judgment on the pleadings pursuant to section 50 of the Code of Civil Procedure. Thereupon the court gave judgment for the defendants on the ground that the contract gave the defendants the absolute right to discharge with or without reason. The provision in question is as follows: "You [meaning the plaintiff] are to be in all respects subject to such orders as from time to time you may receive from your superiors and to dismissal at any time for incompetence or whenever you are dismissed shall in the opinion of the Contractors be for the best interests of the Contractors or the Railway Company. The decision of the said Contractors as to the occasion for any such dismissal shall be final."

We think the learned justice at Special Term correctly construed the contract. Cases of agreements to perform work to the satisfaction of an employer are not in point. Here the

App. Div.]

First Department, March, 1912.

parties have provided by language too plain to require construction that the decision of the employer shall be final.

A point, which apparently was not suggested at the Special Term, is now made by the plaintiff, namely, that the bill of particulars cannot be considered on a motion for judgment on the pleadings. We have already said that one of the purposes of section 547 of the Code of Civil Procedure was to obviate the necessity of waiting until the trial to make the motion. (*Clark v. Levy*, 130 App. Div. 389.) The purpose of the statute was to save expense and delay. It would be absurd to hold that on a motion for judgment on the pleadings before trial the plaintiff's bill of particulars could not be considered, although, if the parties are required to prepare for trial, the case will be dismissed at the opening. We think that on such a motion as this the court may consider whatever might properly be considered on a motion for judgment at the opening of the trial.

The judgment and order should be affirmed, with costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Judgment and order affirmed, with costs.

RAWSON L. WOOD, as Trustee in Bankruptcy of EDELHOFF BROTHERS AND COMPANY, Bankrupt, Respondent, v. THOMAS SIMPSON, Doing Business under the Name and Style OF R. SIMPSON AND COMPANY, Appellant. (Action No. 1.)

First Department, March 8, 1912.

Replevin — action to recover jewel — pledge of jewel by agent with consent of officer of corporation — title of pledgee — corporation — when act of legal entity and act of officer cannot be distinguished — Stock Corporation Law, section 66.

Even though an agent given possession of a jewel for the purpose of sale was guilty of larceny in pledging it, yet where, having subsequently redeemed it, he again pledged it with the full knowledge, consent and active participation of the president of the owner, a corporation, the pledgee's possession is good as against the corporation suing in replevin.

First Department, March, 1912.

[Vol.

As the corporation owning the jewel could only maintain an action of replevin in its own right and as it was bound by the acts of its officers in the course of its line of business, it cannot contend that the act of the officer should be distinguished from that of the corporate entity so as to make the pledgee's title unlawful.

Such pledge is not invalidated by section 66 of the Stock Corporation Law forbidding corporations which have not paid their obligations when due to transfer property to officers in payment of any debt, etc., as the pledge was not made to an officer, but to a third person who advanced money thereon.

APPEAL by the defendant, Thomas Simpson, doing business under the name and style, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of February, 1909, upon the verdict of a jury, and also from an order entered in said clerk's office on the 10th day of February, 1909, denying the defendant's motion for a new trial made upon the minutes and granting the plaintiff an extra allowance.

Charles Blandy, for the appellant.

Charles S. Mackenzie, for the respondent.

MILLER, J.:

The action is in replevin to recover a pearl necklace. The jury have found, upon what we shall assume was sufficient evidence, that the necklace was delivered to one Conrad Schickerling by "Edelhoff Brothers & Company," the bankrupt corporation, for the sole purpose of selling it to a Mrs. Adler for \$12,500, and that Schickerling, without authority of said corporation, pledged it with the defendant on or about December 19, 1905. The undisputed evidence shows that Schickerling procured a Mr. Mayer to redeem the necklace for the purpose of selling it, and that subsequently, and on the 15th day of February, 1906, with the full knowledge, consent and active participation of Gustave Edelhoff, the president of said corporation, it was again pledged with the defendant for a loan of \$3,000, the pawn ticket being delivered to said Edelhoff. The jury found, however, that said Edelhoff did not consent to the repawning with full knowledge of the former pawning. The original complaint charged that Schickerling wrongfully al-

App. Div.]First Department, March, 1912.

unlawfully pledged the necklace with the defendant on February 15, 1906, but on the trial the plaintiff was permitted to amend the complaint to change the date to December 21, 1905.

The finding of the jury as to the second pawning is plainly against the evidence, and we think the amendment of the complaint does not affect the situation. Assuming that the original possession of the necklace by Schickerling was larcenous so that the defendant would not have the benefit of the Factors' Act (see *Freudenheim v. Gütter*, 201 N. Y. 94; *Schmidt v. Simpson*, 204 id. 434), the second pledge or pawning was procured by the corporation itself through its president. The defendant's possession is under the pledge of February fifteenth. The corporation, by its president, not only assented to, but actively participated in procuring, that pledge to be made. It was, therefore, binding on the corporation irrespective of the Factors' Act. (See Laws of 1830, chap. 179; Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 43.)

The plaintiff adduced considerable evidence to show, and now argues, that the corporation, Edelhoff Brothers and Company, was organized by said Schickerling as a part of a scheme to defraud the wholesale jewelers; that said Gustave Edelhoff, its president, was a mere dummy and the corporation itself a mere shell without capital; and the proposition is asserted that the corporate entity can be distinguished from its officers and stockholders, and that the scheme in its inception having been fraudulent, the taking and pledge of the necklace amounted to a theft from the corporation, even though every officer and member of it knew of, assented to and participated in the act. We are unable to follow the argument leading to that conclusion. The plaintiff can maintain this action only in the right of the corporation. It would be a novel doctrine in the law and lead to unexpected results if the corporate entity could be so far distinguished from its members and officers as to prevent its being bound by the acts of the only persons through whom it can act. Of course there is no question here of *ultra vires* acts. If the corporation was a device to steal from the wholesale jewelers, it may be that they could recover their property. The theft in such case would be

First Department, March, 1912.

[Vol. 1]

from them, not from the bankrupt corporation of which the plaintiff is trustee.

The respondent also argued that the pledge was in violation of section 66 of the Stock Corporation Law (Consol. Laws, chap. 59; Laws of 1909, chap. 61), the corporation being insolvent, and was, therefore, void. This section re-enacted section 48 of the former Stock Corporation Law (Gen. Laws, chap. [Laws of 1892, chap. 688], as amd. by Laws of 1901, chap. 35). There would be point in that contention if the defendant had been an officer, director or stockholder, and if the pledge had been made to secure a pre-existing debt. He is not accountable for the use which Edelhoff and Schickerling made of the money obtained on the pledge.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN, and CLARENCE J. J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

RAWSON L. WOOD, as Trustee in Bankruptcy of EDELHOFF BROTHERS AND COMPANY, Bankrupt, Appellant, v. THOMAS SIMPSON, Doing Business under the Name and Style of SIMPSON AND COMPANY, Respondent. (Action No. 2.)

First Department, March 8, 1912.

See head note in *Wood v. Simpson, No. 1 (ante, p. 471).*

APPEAL by the plaintiff, Rawson L. Wood, as trustee, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York upon the verdict of a jury, and also from an order entered in said clerk's office denying the plaintiff's motion for a new trial.

Charles S. Mackenzie, for the appellant.

Charles Blandy, for the respondent.

App. Div.] First Department, March, 1912.**PER CURIAM:**

For the reasons stated in the opinion in *Wood v. Simpson* No. 1 (149 App. Div. 471), decided herewith, the judgment and order appealed from should be affirmed, with costs.

Present—INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN, CLARKE and MILLER, JJ.

Judgment and order affirmed, with costs.

THE CITY OF NEW YORK, Plaintiff, v. GILBERT H. MONTAGUE, as Receiver of FULTON STREET RAILROAD COMPANY, and Others, Defendants, Impleaded with ADRIAN H. JOLINE and DOUGLAS ROBINSON, as Receivers of the METROPOLITAN STREET RAILWAY COMPANY, Respondents, and ALEXANDER SMITH COCHRAN and WILLIAM F. COCHRAN, JR., Surviving Trustees under the Will of WILLIAM F. COCHRAN, Deceased, and Others, Appellants. (Appeal No. 1.)

First Department, March 8, 1912.

Nuisance—suit to abate nuisance—issues raised by defendants as between each other—when judgment for plaintiff should not be postponed.

Where in a suit in equity brought by the city of New York against the receivers of two street railroad companies to abate a nuisance the bond-holders of one of the companies have intervened and by answer demanded an adjudication with respect to which of the two companies should abate the nuisance and pay the expense thereof, in which issue the plaintiff has no interest, the court need not delay judgment for the plaintiff until the issue between the defendants is decided, but may leave that issue for subsequent determination.

APPEAL by the defendants, Alexander Smith Cochran and another, as surviving trustees, etc., and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of November, 1911, striking out part of the amended answers of the said defendants.

Edgar J. Kohler [Alfred A. Gardner with him on the brief], for the appellants.

First Department, March, 1912.

[Vol. 149.]

Alfred Ely, Jr. [Arthur H. Masten, William M. Coleman and Frederick W. Kobbe with him on the brief], for the respondents.

Terence Farley, for the plaintiff.

LAUGHLIN, J.:

This action was brought by the city against the receiver of the Fulton Street Railroad Company, the receivers of the Metropolitan Street Railway Company and other street railway companies to abate a nuisance. The appellants are bondholders of the Fulton Street Railroad Company. They were permitted to intervene in behalf of themselves and all other bondholders of said company similarly situated. Their first pleading was a demurrer, and their demurrer and a demurrer interposed by the receiver of the Fulton Street Railroad Company were argued together and were sustained at Special Term (68 Misc. Rep. 176), but were overruled on an appeal to this court. (*City of New York v. Montague*, 145 App. Div. 172.) Pursuant to leave given by this court, the appellants withdrew their demurrer and answered, and served their answer on the receivers of the Metropolitan Street Railway Company as well as on the plaintiff. The receivers of the Metropolitan Street Railway Company thereupon moved to strike out all of that part of the answer pleaded as a separate defense and counterclaim, thus leaving it consisting merely of admissions and denials.

The facts pleaded in the separate defense and counterclaim are evidently alleged for the purpose of obtaining an adjudication with respect to the primary duty as between the receivers of the Metropolitan Street Railway Company and the receiver of the Fulton Street Railroad Company to abate the nuisance and for the expense of abating it, it being contended in behalf of the appellants, on the facts alleged, that the primary duty rests upon the receivers of the Metropolitan Street Railway Company, who are operating the railroad under a track agreement between the Metropolitan Street Railway Company and the Fulton Street Railroad Company, which is the owner of the franchise. The agreement was in writing and bears date the 19th day of February, 1896, and is made part of and annexed to the answer. The city is indifferent to the controversy pre-

App. Div.]

First Department, March, 1912.

sented by the motion to strike out the part of the pleading; but its counsel urges that the abatement of the nuisance should not be delayed by the controversy between the defendants.

It was suggested by this court on the appeal from the decision on the demurrers that the trial court may decide that the nuisance should be abated by reconstructing the railroad track, the condition of which it is alleged causes the nuisance, instead of removing it. The learned counsel for the respondents contend that the answer presents a new issue not germane to the cause of action alleged in the complaint, and that the city should not be delayed in abating the nuisance by a litigation between these defendants for a decision of the question as to which of them is primarily liable for the expense of abating the nuisance. The right of the appellants to appear in the action is not, and cannot now be questioned. They are properly before the court as parties defendant. The suit being of an equitable nature, the court may determine, as between the receiver of the Fulton Street Railroad Company and the receivers of the Metropolitan Street Railway Company, which should be required to abate the nuisance, or, if both are required to abate it, so far as the city is concerned, upon which rests the primary duty and the obligation to reimburse the other, if such obligation should be found to exist. (See Code Civ. Proc. § 521; *City of New York v. U. S. Trust Co.*, 116 App. Div. 349; *Metropolitan Trust Co. v. Tonawanda, etc., R. R. Co.*, 43 Hun, 521; affd., 106 N. Y. 673; *Kenney v. Apgar*, 93 id. 539.) The decision of these questions need not be permitted and should not be permitted to materially delay the abatement of the nuisance if one be found to exist, for the court is given authority to direct judgment for the relief to which the plaintiff may be entitled in advance of the trial and decision of the issues between the defendants. (Code Civ. Proc. § 521.) The pleading was, therefore, proper and should not have been stricken out.

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

CLARKE, McLAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

ANNIE DUFFY, as Administratrix, etc., of JOHN DUFFY, Deceased, Respondent, v. THE CITY OF NEW YORK, Appellant.

First Department, March 8, 1912.

Municipal corporation—negligence—death caused by hole in pavement—evidence as to size of hole and to cause of death—when municipality not liable.

In an action against a city to recover damages for death alleged to have resulted from a fall caused by a hole in the asphalt pavement, there was a conflict of testimony as to the size and depth of the hole in the pavement and as to whether decedent's death resulted from the fall or from typhoid fever.

Held, that the preponderance of the testimony was that the hole at its deepest point was not more than three or four inches in depth, and that this is not such a defect in the highway as rendered the city liable for injury suffered therefrom;

That upon the entire proof it is clear that the decedent died as the result of typhoid fever, with which the fall had no connection

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 21st day of June, 1911, upon the verdict of a jury for \$2,500, and also from an order entered in said clerk's office on the 19th day of June, 1911, denying the defendant's motion for a new trial made upon the minutes.

Loyal Leale, for the appellant.

John J. Welsh, for the respondent.

DOWLING, J.:

John Duffy, a driver in the employ of Owens & Co., resided at No. 325 East Forty-seventh street in the city of New York. At about noon on August 8, 1910, he left his wagon in front of the wagon works at No. 415 East Forty-seventh street to be repaired, and stabling his horses in the adjoining premises (421) went to his home for lunch. Upon his return, as he was walking east and apparently about to turn into the wheelwright's shop at No. 415, he suddenly fell upon the sidewalk. The only eye-witness to the accident was a boy who at the time

App. Div.]

First Department, March, 1912.

was about twelve years of age. He testified that the day in question was misty, dark and cloudy, and that rain had fallen in the morning. Just as Duffy was about to turn into the shop his foot slipped "off the sidewalk" and "into the hole" therein, which was in front of the shop. The witness reiterated the statement that the decedent's "foot slipped off the asphalt into the hole and he fell." This hole was caused by the wearing away of the asphalt covering of the walk and adjoined the runway for vehicles into the shop, which was composed of paving blocks only with no asphalt covering. It was irregular in shape and varied in depth. Its extent was one of the disputed questions in the case. After the accident Duffy was taken to Flower Hospital suffering from a fracture of the tibia, the result of his fall. He was thereafter removed to Bellevue Hospital, where he finally died on October 30, 1910. The cause of his death is also in dispute, plaintiff's contention being that it was due to the fall, defendant's proof being that it was due directly to typhoid fever. Upon the trial of the action plaintiff recovered a verdict for \$2,500. The present appeal is from the judgment entered thereupon and from the order denying a new trial. Upon the question as to the size of the break in the asphalt covering of the sidewalk, plaintiff produced the boy Williamson, Bernard Rock, a letter carrier, and Charles Mann, a wheelwright employed in No. 415, none of whom had ever measured the depression, but who gave their estimates of its extent. The first witness gave its depth as seven inches, and when asked to indicate his idea of that distance measured off a space of eight and one-half inches; the second gave the depth of the hole as eight inches, the width as a foot and a half, and the length as five feet; the third witness gave the length of the break as four and one-half to five feet, the width as a foot and a half and the depth about six inches. All agreed that it had been present for a year, gradually growing larger as wagons passed over it on their way into the shop. The defendant produced six witnesses, three of whom had made actual measurements of the break; one of these was Daniel Twomely, an examiner in the finance department, who measured it on August 10, 1910, and found it three inches deep at the deepest point, ten feet long and with hard earth at the bottom; the sec-

First Department, March, 1912.

[Vol. 14]

ond was Charles Weinberg, a mechanical engineer employed by the board of education, who measured it on August 21, 1910, and described it as twenty-three inches in width at its widest part, gradually diminishing in extent towards the curb and house line, and three inches in depth at its deepest part in the center of the walk; the third, George Seinner, an examiner of claims in the corporation counsel's office, measured it on September 1, 1910, and found it three inches deep at the deepest point, and ten feet long, with hard earth at the bottom. The other witnesses were Harold L. Coe, a photographer, who visited the scene of the accident on August 11, 1910, and stated that the deepest part of the hole was three inches; Officer Albert Alboniga, who gives its depth as from three to four inches, and William Hoeler, in front of whose shop it was located, and who estimated its depth at the spot where Duffy fell as three to four inches. The preponderance of the testimony is clearly that the hole at its deepest point was not more than three to four inches in depth, and this is not such a defect in the highway as will render the city liable for injury suffered therefrom. (*Butler v. Village of Oxford*, 186 N. Y. 444; *Hamilton v. City of Buffalo*, 173 id. 72; *Schall v. City of New York*, 88 App. Div. 64; *Henry v. City of New York*, 119 id. 432.)

Upon the question of the cause of decedent's death, plaintiff produced two physicians as witnesses, neither of whom had ever seen decedent, and who in answer to a hypothetical question which excluded certain vital elements tending to show the presence of typhoid fever, gave it as their opinion that Duffy's fall was a competent producing cause of his death. One of these experts, Dr. Francis M. Burke, assumed in answering the question that Duffy had thrombosis and he testified that death was due to the septic condition following the injury to the leg known as septic pneumonia, in conjunction with thrombosis of the intestinal vessels. On cross-examination he admitted that the rose spots upon the abdomen are one of the signs of typhoid fever, and that such spots, accompanied by a high temperature, and the presence of the typhoid bacillus in a blood culture, might indicate the presence of typhoid. In answer to a question embracing the clinical history of the case during the time

App. Div.]

First Department, March, 1912.

that typhoid fever was claimed to be present, he admitted that upon the facts stated it would look like a case of typhoid. The other expert, Dr. Robert L. Grahame, gave the cause of death as "a thrombotic stopping of the circulation in the lung at the location described by the rales and likewise a similar condition setting up in the gut." Both these witnesses testified to the results of a gangrenous condition of the intestine. For the defense, apart from one expert, the testimony came from physicians in actual attendance upon the patient. Dr. Gaston A. Carlucci, interne at Bellevue Hospital, attended Duffy there for the fracture of the tibia, beginning on August 10, 1910, and cared for him until the plaster cast was removed on October second, at which time no signs of ecchymosis remained on the leg, and the only evidence of the injury was a callous over the fracture. Duffy had progressed normally towards recovery until September twenty-fifth when his temperature rose and he began to complain of pains in the head, followed by a chill the following day and still higher temperature. After three days' observation a blood culture was taken and his symptoms were diagnosed as those of typhoid fever, the rose spots having then appeared all over the abdomen, with several on the chest. When the report of the examination of the blood culture was made on October second it disclosed the presence of the typhoid bacillus, which was seen by Dr. Carlucci himself under the microscope. He was then removed to another pavilion. The blood count on October twenty-fifth showed an increase in the leucocytes to eighty-eight, instead of the normal seventy-five or seventy-six, and the patient's temperature rose several degrees. An operation was then performed by Dr. John B. Walker, the visiting surgeon, upon which a perforation of the intestines was found, diagnosed as due to typhoid fever. The death on October thirtieth was due in witnesses' opinion to typhoid fever. Dr. John B. Walker, the surgeon who operated on Duffy, testified to the details of the operation, in the course of which he found the perforation in the part of the bowel known as "Peyers patches," which was due to typhoid fever. He swore that in his opinion Duffy was not suffering from an embolus or thrombus prior to his death and described the condition actually found in the bowel which confirmed his

First Department, March, 1912.

[Vol. 14]

view that there was a perforation, due to the typhoid germ and not a gangrenous condition due to a thrombus or embolism. Upon the entire proof in this case it is clear that the answers of two experts to a hypothetical question which excludes the most significant elements tending to prove the presence of typhoid fever, and in reply to which they swear that in their opinion the decedent's fall would have been competent producing cause of his death more than two months afterwards, cannot carry more weight or possess more probative force than the testimony of two physicians who actually attended the patient, who diagnosed his ailment, who described his condition and symptoms, one of whom examined the blood culture, the other of whom performed the operation upon him and both of whom testified positively that he died from typhoid fever, with the progress of which disease the entire medical record of the case is consistent and all of whose characteristic indicia were exhibited by the decedent. Upon this record the preponderance of the proof is that Duffy died as the result of an attack of typhoid fever, with which his family had no connection whatever.

The judgment and order appealed from must, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and MILLER, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

NEVADA VAN VALKENBURGH, Respondent, *v.* PHILIP VAN VALKENBURGH, Appellant.

First Department, March 8, 1912.

Deposition — husband and wife — action for separation — counterclaim — examination of defendant as to his financial condition denied.

Where in an action for separation the plaintiff demands relief on the ground of defendant's cruelty, abandonment and failure to support her and the defendant, after admitting the abandonment and non-support,

App. Div.]

First Department, March, 1912.

sets up a counterclaim wherein he alleges he was justified in such abandonment because of plaintiff's cruel and inhuman treatment of him and abandonment as well, an order for the examination of the defendant before trial to disclose the amount of his income and property that the amount of alimony may be determined should not be granted. The question of defendant's financial condition in reference to any award of alimony does not become an issue until plaintiff has succeeded in establishing her right to the judgment which she seeks.

LAUGHLIN, J., dissented, with opinion.

APPEAL by the defendant, Philip Van Valkenburgh, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 31st day of January, 1912.

William M. K. Olcott, for the appellant.

Edward Lauterbach, for the respondent.

DOWLING, J.:

Appeal from an order denying a motion to vacate an order for the examination of the defendant before trial.

The action is brought for a separation. The pleadings are not before us but the affidavits disclose that the plaintiff demands relief on the ground of defendant's cruelty, abandonment and failure to support her. Defendant admits the abandonment and non-support, and alleges that he was justified in such abandonment because of plaintiff's cruel and inhuman treatment of him and that plaintiff abandoned him as well. In the original moving affidavit for the order it was averred that the testimony of defendant was necessary and material to the plaintiff upon the trial of this action in order to disclose the amount of plaintiff's income and property, and "that the alimony to be adjudged and provided for in the final judgment for the maintenance of the plaintiff may be determined;" also to show what demands upon defendant's property and income exist apart from plaintiff's support; and finally that the "testimony is material and necessary in order to determine the amount of permanent alimony to which the plaintiff may be entitled." The papers before us sufficiently demonstrate that the examination of defendant is not now necessary or material

First Department, March, 1912.

[Vol. 14]

to plaintiff. The question of defendant's financial condition in reference to any award of alimony does not become an issue until plaintiff has succeeded in establishing her right to the judgment which she seeks. Should she fail in her action, or should the defendant recover judgment in his favor upon his counterclaim wherein he asks for relief, the information sought by the examination would be immaterial, unnecessary and useless.

The situation is analogous to that of an action to have a conveyance, absolute upon its face, declared to be a mortgage and for an incidental accounting (*Fogarty v. Fogarty*, No. 1, 12 App. Div. 272); or an action for an accounting under an agreement to divide certain profits (*Moore v. Reinhardt*, 132 id. 707) or an action to set aside an assignment of an interest in a partnership and for an accounting (*Gow v. Ward*, 144 id. 593) in all of which cases the right to an examination and discovery before trial was denied, as the accounting followed only as the result of the determination of the main issue. Here the right to alimony, if any, can only arise from a determination of the main issue in plaintiff's favor, and until that is so decided the question of defendant's financial situation as a possible basis for alimony is immaterial and not necessary to the establishment of plaintiff's rights. As that is the sole subject of the examination which has been ordered, the order appealed from must be reversed, and the motion to vacate the order for the examination of defendant granted.

McLAUGHLIN, CLARKE and SCOTT, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

I am of opinion that the plaintiff was entitled to the order for the examination of the defendant. The provisions of the Code of Civil Procedure with respect to the trial of an action for separation contemplate but a single trial and that the plaintiff shall introduce all of his evidence before he rests and that the final judgment shall thereupon be decreed which if in favor of a wife shall provide for her support and for the maintenance and education of the issue of the marriage. (Code Civ. Proc.

App. Div.] First Department, March, 1912.

§ 1766.) It is said that the practice in this judicial district is to take the evidence bearing upon the main issues and then to suspend the trial until the court reaches a decision with respect to the merits of the case, and if it shall be in favor of the wife, to resume the trial for the purpose of taking evidence with respect to the husband's property and income. That is not the practice throughout the State, and I find no warrant for it in the Code of Civil Procedure. I think the plaintiff is as much entitled to such an examination for the purpose of affording a basis for the award of alimony as upon the main issues, for they are to be decided by a single decree, and no useful purpose is to be served by trying the cause piecemeal.

I, therefore, vote for affirmance.

Order reversed and motion granted.

FRANK X. PETTIT, Respondent, *v.* ALICE B. PETTIT and Others,
Appellants. (No. 1.)

First Department, March 8, 1912.

Will—action to revoke probate—evidence not establishing undue influence or testamentary incapacity—burden of proof—gift to attorney—request by wife that husband provide for her by will—new trial—failure of jury to make special finding—evidence—opinion of experts.

Action under section 2653a of the Code of Civil Procedure to revoke the probate of a will on the ground that the testator lacked testamentary capacity, and that the execution was procured by undue influence. Evidence examined, and held, insufficient to justify the submission of the question of undue influence to the jury, and that a finding that the testator lacked testamentary capacity was against the weight of evidence.

The decree of a Surrogate's Court admitting a will to probate is *prima facie* proof of its validity, and in an action to revoke probate under section 2653a of the Code of Civil Procedure the burden is upon the plaintiff to overcome the presumption.

The fact that a testator bequeathed to the attorney who drew the will, and who had been a personal friend for many years, jewelry to the value of \$650 does not of itself show undue influence by the attorney.

First Department, March, 1912.

[Vol. 149.]

The fact that a wife requested her husband to provide for her by will does not show undue influence on her part, for she had a right to induce her husband to make suitable provision for her support.

Where it is impossible to tell whether a verdict revoking the probate of a will was rendered on a finding of undue influence or upon a finding that the testator lacked testamentary capacity, there being no special verdict on those issues, judgment for the plaintiff will be reversed where the court erred in submitting to the jury the first question.

Where proof of the testator's acts and business dealings showed that he had testamentary capacity the opinions of experts based upon hypothetical questions in opposition to such proof scarcely, if at all, raises an issue for the jury.

APPEAL by the defendants, Alice B. Pettit and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of February, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 7th day of March, 1911, denying the defendants' motion for a new trial made upon the minutes.

Stephen O. Lockwood, for the appellants.

George Gordon Battle, for the respondent.

MC LAUGHLIN, J.:

Action under section 2653a of the Code of Civil Procedure to revoke the probate of a will upon the grounds (1) that it was not duly executed; (2) that the testator did not have testamentary capacity, and (3) that the execution was procured by undue influence.

The testator, seventy-six years of age, died on the 17th of March, 1910. By his will he gave to his wife, the defendant Alice B. Pettit, stepmother of the plaintiff, an apartment house in the city of New York in which he had an equity of a little over \$10,000; personal property of small value; and a cemetery plot; to the plaintiff, his only surviving child by a former marriage, he gave a cemetery plot; a gold watch and chain, and all the testator's wearing apparel; to the defendant McAllister, who had been his attorney for many years, he gave a diamond ring, studs and cuff buttons of the value of about \$650; and all the rest, residue and remainder of his property, of the value of about \$8,000, he divided equally between

App. Div.] First Department, March, 1912.

his wife and the plaintiff. The defendant Lockwood was made sole executor. At the trial the first ground was abandoned, and the case sent to the jury upon the other two issues—undue influence and lack of testamentary capacity. It rendered a verdict in favor of the plaintiff, and the defendants appeal.

After a careful consideration of the record I am unable to find any evidence to justify a submission to the jury of the question of undue influence. Substantially all the evidence that is claimed to bear upon this issue is that the will was drawn some five months before the testator's death by the defendant McAllister, to whom were given the diamond ring, cuff buttons and studs; that the executor was a member of a law firm with which McAllister was associated; and that the subscribing witnesses were, respectively, a partner and an employee of the executor. There is no evidence that any effort was made by any one to induce the testator to make the will or to make it in the way which he did. The decree of the Surrogate's Court admitting the will to probate established *prima facie* its validity, and the burden was upon the plaintiff to overcome such proof. (*Dobie v. Armstrong*, 160 N. Y. 584.) "What the law terms undue influence," says the Court of Appeals in *Matter of Snelling* (136 N. Y. 515), "is not established by proof tending to show that the testator acted from motives of affection or gratitude, though the objects of her bounty were strangers to her blood. The influence or moral coercion, or by whatever other term designated, must be such as to overpower the will of the testator, and subject it to the will and control of another, in which case it assumes the character of fraud." A will cannot be invalidated on the ground that its execution was procured by undue influence unless it be clearly and satisfactorily established that the influence exerted or the power used was such as to deprive the testator of a free exercise of his intellectual powers. (*Heath v. Koch*, 74 App. Div. 338; affd., 173 N. Y. 629; *Marx v. McGlynn*, 88 id. 357; *Scott v. Barker*, 129 App. Div. 241.)

The fact that the attorney who drew the will is a beneficiary under it to a small extent does not show undue influence. (*Haughian v. Conlan*, 86 App. Div. 290; *Matter of Marlor*, 121 id. 398.) This attorney had transacted the testator's legal

First Department, March, 1912.

[Vol. 149.]

business for several years. He, or his firm, had also acted for the testator's wife. It is quite evident he had confidence in the firm, and was fond of the attorney, and it is not at all surprising that he should give him these articles. Such disposition, standing by itself, is of no significance whatever.

It is true that the testator gave the greater part of his property to his widow. There is nothing to show he did so by reason of any influence exerted by her, though, had she requested him to make it that way, it would not have invalidated the will. A wife has a perfect right to try to induce her husband to make a suitable provision in his will for her support. The record here discloses a very good reason why the testator should have made the provision which he did for his widow. They were married in 1894 and from some time in 1895 until 1909 she kept a boarding house and the proceeds were used towards supporting her husband and herself. There was nothing, therefore, to submit to the jury upon the subject of undue influence and the court should have so held. In submitting this question to the jury the court erred and this alone would necessitate a new trial, even though there were evidence to go to the jury on lack of testamentary capacity, because it is impossible to tell whether it found for the plaintiff upon one or both issues. In the absence of a special verdict, where two issues are submitted to the jury, as to one of which a verdict for plaintiff is unsupported by evidence, a judgment for plaintiff must be reversed. (*Rosenstock v. Metzger*, 136 App. Div. 620; *Buchanan v. Belsey*, 65 id. 58.)

Upon the question of whether the testator had testamentary capacity at the time the will was executed it may be, under the doctrine of *McDonald v. Metropolitan St. R. Co.* (167 N. Y. 66), and *Hagan v. Sone* (174 id. 317), that the case had to be submitted to the jury, but its finding that he did not have testamentary capacity is, I think, clearly against the weight of evidence. It appeared that the testator, prior to 1884, was actively engaged in business in the city of New York as a builder; that in March of that year he was confined in the Bloomingdale Asylum where he remained for four months; that he was then suffering from "manic depressive insanity," but was discharged from the asylum as improved,

App. Div.] First Department, March, 1912.

though subsequently the same year he spent a few months in a sanitarium; that sometime before 1890 a judgment for damages was obtained against him for killing a man with a shot gun, but it does not appear under what circumstances the killing was done, except that a witness who saw the record in that action testified that the shot gun was "accidently discharged;" that in 1890 he exchanged some property in Saratoga, N. Y., for eight tenement houses in the city of New York, and from that time until he disposed of them in 1901 he took exclusive charge of them, collecting the rents, paying the taxes, etc.; that the tenants of these houses were mostly colored people; that he would collect the rent by having it thrown out of the windows when he blew a whistle, and when the tenants did not throw out the rent he would fire off a pistol; that he disliked cats and devoted much of his time to driving them away from the premises; that on one occasion he fired at a cat in the yard with a pistol and came near hitting one of the tenants; that at another time he got into an altercation with one of the tenants and fired at the latter's feet; that in 1899 he went to his nephew and told him he was trying to get appointed to the position of superintendent of buildings and asked the nephew to sign his application; that he told him to write his signature as John Pettit, whereas the latter's name was John L. Pettit, and to state his address in a certain building where the nephew did not live or have an office, offering to hire a room there for him for a month so that he could give that address; that he then stated he had a letter of introduction to the mayor, which, upon inspection, turned out to have been written by himself; that during the last two years of his life he was feeble, forgetful, did not at times recognize former acquaintances and talked disconnectedly; would hire plumbers and painters to do certain work and upon their arrival they would find others doing what they had been hired to do; that he would then countermand his orders, saying he had forgotten hiring both; that he would make purchases in the stores and after paying therefor offer to pay over again; that after collecting the rent of his tenants he would, on some occasions, try to get them to pay the second time; that about a month before the making of the will he went to the police sta-

First Department, March, 1912.

[Vol. 149.]

tion and asked a police officer whom he had known for some time for a warrant in dispossess proceedings against persons who had for several years ceased to be his tenants; and that frequently he had to be assisted in dressing.

Other incidents of similar character were testified to, mostly by casual observers, and if not disproved were susceptible of explanation. Two medical experts testified assuming all of the facts stated to be true, without taking into consideration the testimony offered in explanation, that the testator, at the time the will was executed, did not have testamentary capacity.

On the other hand it appeared that the testator, after he acquired the tenement houses referred to, and all the time he owned them, collected the rents, looked after the repairs, and took exclusive charge of them; that between 1890 and 1905 he was more or less actively engaged in business; that he sold the tenement houses; that he acquired the apartment house referred to; that he thereafter took exclusive charge of it; that up to within a very short time of his death he went about the city alone; that he was able to and did look after his own affairs; that after the execution of the will in question he went alone to the office of the plaintiff's witness, Murtha, who was an attorney and relative; that he stated he had made his will, was not satisfied with it, and wanted to make another; and that the matter was discussed between him and Murtha quite fully. This is especially significant because it shows he knew he had made a will and also what was in it.

Leaving out of consideration the testimony of the medical experts based upon the hypothetical question, I am of the opinion, assuming all of plaintiff's evidence to be true, it did not justify the jury in finding that the testator did not have testamentary capacity at the time the will was executed. He had sufficient intelligence to look after his own affairs; knew who his relatives were and those who had a claim on his bounty; knew what property he had and took charge of it; knew he wanted to make disposition of it by will, and after making it discussed making another because he was not entirely satisfied with the one he had made. One who has such intelligence has testamentary capacity (*Delafield v. Parish*, 25 N. Y. 9; *Matter of Martin*, 98 id. 193; *Dobie v. Armstrong, supra*; *Ivison v. Iv-*

App. Div.] First Department, March, 1912.

son, 80 App. Div. 599), and the proof of experts based upon a hypothetical question in opposition to proof showing such intelligence, scarcely, if at all, raises an issue for a jury.

The judgment and order appealed from, therefore, are reversed and a new trial granted, with costs to appellants to abide event.

INGRAHAM, P. J., **LAUGHLIN**, **MILLER** and **DOWLING**, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellants to abide event.

UVALDE ASPHALT PAVING COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.

First Department, March 8, 1912.

Appeal — effect of affirmance without opinion — municipal corporations — examination of municipal corporation before trial — inspection of public records — application for examination denied.

An affirmance by the Appellate Division of an order vacating an order is not a decision that part of the opinion of the court below was correct, if other grounds existed for vacating the order.

The nature of municipal corporations and the functions of officers thereof discussed, per **LAUGHLIN**, J.

Quare, as to whether sections 870 and 872 of the Code of Civil Procedure relating to the examination of a party before trial apply to a municipal corporation.

As the charter of the city of New York and the General Municipal Law allow the examination of municipal records by taxpayers, and to some extent by the public in general, and provide a summary remedy if the examination be refused, an order for the examination before trial of the city of New York, a party defendant, as to municipal records should be denied where the applicant does not show that it is not a taxpayer and has no adequate remedy under the statutes aforesaid.

APPEAL by the plaintiff, the Uvalde Asphalt Paving Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of January, 1912, granting the defendant's motion to vacate an order for the examina

tion of the defendant before trial, through the president of the borough of The Bronx, the principal assistant engineer and the chief engineer of said borough and the permit clerk in the office of said president.

Edward M. Grout [*James F. McKinney* with him on the brief], for the appellant.

Terence Farley [*Francis Martin* with him on the brief], for the respondent.

LAUGHLIN, J.:

The learned counsel for respondent contends that the order should be sustained upon the broad ground that the provisions of sections 870 and 872 of the Code of Civil Procedure, with respect to the examination of a party before trial, do not apply to a municipal corporation. In *Havemeyer v. City of New York* the court at Special Term expressed the opinion that those provisions do not apply to a municipal corporation, and the order for the examination of the chief engineer of water supply, gas and electricity of the city was vacated, but other grounds existed for vacating the order, and, therefore, the affirmance of the order by this court without opinion (136 App. Div. 931) does not necessarily constitute an authority in favor of the contention of the counsel for the respondent.

Municipal corporations are mere governmental bodies, having charge of and jurisdiction over particular political subdivisions of the State, and as a rule their official records are open to the inspection of taxpayers and to others interested therein. (Greater N. Y. Charter [Laws of 1901, chap. 466], §§ 1545, 1546; Gen. Mun. Law [Consol. Laws, chap. 24; Laws of 1909, chap. 29], § 51.) Their officers, agents and servants are the officers, agents and servants of the people, and there is not the same reason for making provision for their examination as in the case of private corporations. The provisions of section 870 of the Code of Civil Procedure with respect to taking the deposition of *either party* to an action, are clothed in general language; but they were construed as not authorizing the examination of the officers, servants, agents and employees of a party, and such construction rendered them inapplicable to,

App. Div.] First Department, March, 1912.

or inoperative with respect to, corporations (*People v. Mutual Gas Light Company*, 74 N. Y. 434; *Boorman v. Atlantic & Pacific R. R. Co.*, 78 id. 599) until the Legislature amended subdivision 7 of section 872 of the Code of Civil Procedure, by prescribing that when the party sought to be examined is a *corporation* "the affidavit shall state the name of the officers or directors thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers." (Laws of 1880, chap. 536.) After this amendment it was decided that the agents, servants and employees of a corporation, who do not fall within the description of *officers or directors*, could not be examined. (*Reichmann v. Manhattan Company*, 26 Hun, 433.) It had also been decided, prior to the enactment of said amendment, that the provisions of section 803 of the Code of Civil Procedure, with respect to a discovery, or giving an inspection and copy, were inoperative as to corporations (*Boorman v. Atlantic & Pacific R. R. Co.*, *supra*), and hence the Legislature provided in the amendment for both examination and discovery as to a corporate party. There is much room for argument on these considerations and on the phraseology of the sentence from which the quotation is made that the Legislature had in mind those corporations which have *both officers and directors*, for the applicant is required to state whether he desires to examine the officers or the directors, and which of them. Every business corporation, and every corporation other than municipal corporations, has a board of directors, or a board of trustees, or officers, by other titles, performing corresponding functions, and *officers* as well. Municipal corporations have certain officers, but they have no trustees or board of directors, or other officers performing corresponding functions. In a broad sense municipal corporations have many officers; that is to say, officials who are required to take an oath of office, and are deemed for certain purposes officers of the municipality; but most of them perform duties prescribed by statute and not by any local body exercising

similar functions to those of a board of directors or other governing body of private corporations. In a more restricted sense the mayor, comptroller, treasurer, corporation counsel and like general officers elected on the general ticket or appointed for the municipality are regarded as the municipal officers (see Code Civ. Proc. § 431); but in the broad sense municipal officers include all local elective or appointive officers, including appointees under the Civil Service Law. (N. Y. Const. art. 10, § 2; *People ex rel. Balcom v. Mosher*, 163 N. Y. 32; *People ex rel. Percival v. Cram*, 164 id. 166; *People ex rel. Metropolitan St. R. Co. v. Tax Commissioners*, 174 id. 417; *Matter of Sugden v. Partridge*, Id. 87; *Matter of Fay*, Id. 526; *People ex rel. Lahey v. Partridge*, 74 App. Div. 291; *Village of Saratoga v. Van Norder*, 75 id. 204; *People ex rel. Bush v. Houghton*, 182 N. Y. 301; *People ex rel. Bolton v. Albertson*, 55 id. 50; *People ex rel. Williamson v. McKinney*, 52 id. 374; *People ex rel. Lord v. Crooks*, 53 id. 648.) It has been held, however, that a municipal corporation is a *domestic corporation* within the contemplation of the provisions of subdivision 18 of section 3343 of the Code of Civil Procedure and that it is a *resident* of the State and of the county wherein it has its principal place of business. (*Maisch v. City of New York*, 193 N. Y. 460.) The only authority at all in point which we have been able to find is *Linehan v. Cambridge* (109 Mass. 212). It was there held that a statute authorizing the examination of an adverse party and providing that where a corporation is a party "the opposite party may examine the president, treasurer, clerk or any director or other officer" thereof applied only to corporations in the ordinary acceptation of the term and did not include municipal corporations. It would seem, therefore, that there is much force in the contention that the provisions of subdivision 7 of said section 872 should be construed as not applying to municipal corporations.

The considerations already expressed, however, show that if said statutory provisions apply to a municipal corporation there can seldom be justification for resort thereto since the *principal* municipal officers to whom the statute would necessarily be confined would ordinarily have little or no personal knowledge and would be able at most to produce records which under the

App. Div.] First Department, March, 1912.

provisions of sections 1545 and 1546 of the Greater New York charter and section 51 of the General Municipal Law may be examined and copied by taxpayers, and to some extent, at least, by the public generally, and if an inspection and copy should be denied, a summary remedy by application to a justice of the Supreme Court is expressly given by said section 1545 of the Greater New York charter regardless of the pendency of an action.

In the case at bar it clearly appears that the only object of the examination is to obtain an inspection of the records in the office of the president of the borough of The Bronx, showing permits to occupy, open or disturb the surface of Valentine avenue between One Hundred and Ninety-fourth street and Two Hundred and Fourth street during a certain period. The appellant shows that an inspection of said records has been refused; but it does not show that it is not a taxpayer and that it has not an adequate remedy under said sections 1545 and 1546 of the Greater New York charter, and said section 51 of the General Municipal Law. Municipal officers are servants of the public, and their time should be devoted to the performance of their public duties, and they should not unnecessarily be required to appear for examination with respect to litigation by or against the city, even if there be authority therefor.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

INGRAHAM, P. J., MC LAUGHLIN and CLARKE, JJ., concurred; MILLER, J., concurred in result on the ground that the statute does not apply to municipal corporations.

Order affirmed, with ten dollars costs and disbursements.

BENJAMIN F. SCHWARTZ and FRANK SCHWARTZ, Copartners, Carrying on Business under the Firm Name and Style of SCHWARTZ BROTHERS, Respondents, *v.* JEANNETTE P. GOIN, Appellant.

First Department, March 8, 1912.

Bills and notes — defenses — fraud of payee — knowledge of transferee, when question for jury — credibility of witness.

Action by the transferees of a promissory note against the maker who as a defense alleged that the payee procured the execution of the note by fraud, of which the plaintiffs had knowledge and that they gave no consideration for the transfer. Evidence examined, and held, that the question as to whether the plaintiffs were holders in due course should have been submitted to the jury and that the direction of a verdict for the plaintiffs was error.

In such action testimony by the transferees as to the consideration they paid for the note is not conclusive if the jury by accepting the defendant's testimony might deem the plaintiffs unworthy of belief; and this is so although the credibility of a party is no longer a question for the jury merely on account of his interest.

APPEAL by the defendant, Jeannette P. Goin, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 24th day of May, 1911, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 5th day of June, 1911, denying the defendant's motion for a new trial made upon the minutes.

Eugene N. Robinson, for the appellant.

L. E. Warren, for the respondents.

LAUGHLIN, J.:

The plaintiffs have recovered on a promissory note made by the defendant on the 5th day of October, 1910, whereby she promised to pay to the order of one Samuel Rosenfield, sixty days after date, the sum of \$2,500, with interest, which plaintiffs allege was indorsed and transferred to them for a good and valuable consideration before maturity. The answer admits the making of the note, but puts in issue the other allegations, and for separate defenses pleads, among other things, that the payee procured the execution of the note by

App. Div.]

First Department, March, 1912.

falsely and fraudulently representing to defendant that he had for sale a rare edition *de luxe* of the works of Charles Dickens, on the purchase price of which he owed a balance of \$8,000, and was being pressed for payment; that Mrs. C. P. Huntington, who was then absent from home, was ready, willing and able to purchase the books at a price which would give him \$13,000 profit, and he requested defendant to give him a check for \$500, and two promissory notes to make up the balance of the \$8,000 and as security he agreed to deposit the books in the safety vault of the Night and Day Bank, and on the return of Mrs. Huntington defendant was to deliver to him an order for the books on receipt of a certified check or cash for the indebtedness and \$1,000 for the loan; that he did not intend to deposit the books and did not so deposit them, and made the representations with a view to deceiving the defendant, who relied thereon and executed the note; that defendant received no consideration for the note and there was a total failure of consideration, and that plaintiff gave no consideration therefor, and received the note with knowledge of the facts and circumstances under which it was made, and has brought this action in the interests of the payee. On the trial the plaintiff Benjamin Schwartz testified that his firm was engaged in the jewelry business; that five days after the date of the note the payee requested plaintiffs to take it in exchange for diamonds, and plaintiffs sold to him diamonds of the value of \$2,650, consisting of a pearl necklace, a pearl cluster scarf pin, a ring and a brooch, and received in payment the note and \$150 in cash; that he had been acquainted with the payee about four years and had on several prior occasions sold him diamonds, and at times on credit, that before taking the note he investigated the credit of the maker through Bradstreets and received a favorable report; that the payee informed him that the note was given for books which the payee sold to the defendant.

The testimony of defendant in her own behalf tends to show that the payee, whom she did not know, called upon her at her residence with a note signed by a Mrs. Huntington — the contents of it are not given — and represented that she would give \$32,000 for the set of books, but that she was then absent, and at his suggestion defendant telephoned to Mrs. Hunting-

First Department, March, 1912.

[Vol. 149.]

ton's house and was informed that she would return in about ten days, and that he further represented he could get the books from one Thomas for \$8,000, and would give her one-half the profits if she "would go in with him on this deal," and let him have her notes for \$8,000, to be given to Thomas, and that the \$8,000 could be paid by raising money on some People's Gas stock owned by his wife and that then the notes would be returned to her; that he accompanied her to the Day and Night Bank, and after consulting with the president or vice-president about said gas stock she told him that she could get the money but that as she did not know him she would not give him the notes until he was identified; that he subsequently brought to her house the plaintiff Benjamin Schwartz, who informed her that he was in the jewelry business and where his store was; and that he had known the payee a long time and had done business with him and that "he is all right," and further said, "In fact, I am coming in this deal a little bit myself;" that she then told Schwartz that she was giving a check for \$500 and two notes for the books and that both of them said: "It would be perfectly all right; they were to be held; * * * given to Mr. Thomas and held until the People's Gas stock arrived, and I was to get that money to give to them and they were to give me back my notes;" that the payee and one Warfield, who stated he was private secretary to Thomas, called the next day and stated that if she would sign the notes they would bring the books; that she did so and the books were brought, and the next day they informed her that the books were too valuable to be left there and she suggested that they be taken to the Night and Day Bank; that Schwartz said that he was a little interested in the transaction and knew the payee very well, and that she told him about the notes that she was going to give to be held until she got the money on the People's Gas stock, and then the money was to be given to Thomas for the books and the notes to be returned to her. The defendant's daughter corroborated her with respect to part of the conversation between herself, Schwartz and the payee, and specifically on the point that he stated that he was interested in the deal. Schwartz denied that he called on the defendant with the payee. At the close of the evidence the court directed a verdict for the

App. Div.]

First Department, March, 1912.

plaintiffs for the amount of the note, and counsel for defendant duly excepted thereto.

I am of opinion that the case should have been submitted to the jury; for if the jury believed the testimony of the defendant, the plaintiffs were not holders of the note in due course and in good faith, because one of them was interested with the payee in the transaction with respect to the books and had notice of the material facts and circumstances under which the note was given, and that it was not to be negotiated but was to be held by Thomas and was to be returned to the defendant when the indebtedness to Thomas for the books was paid by the moneys which, it was expected, would be raised or realized on the gas stock owned by the payee's wife. The defendant was not permitted to show that the books were not deposited at the bank in her name but in the name of another and were withdrawn, and an exception was duly taken to the exclusion of the evidence. Although it was not shown that the representations made by the payee with respect to the books and Mrs. Huntington were not true, the evidence was sufficient to warrant the jury in finding that the note was not obtained for the purpose stated and that the representations with respect to the use to be made of it were fraudulent, and that if plaintiffs were not parties to the fraud, they at least had actual knowledge thereof. Moreover, Schwartz's testimony with respect to the consideration paid for the note was erroneously accepted as conclusive, for although it is no longer the rule that the credibility of a party merely on account of his interest is for the jury (*Second Nat. Bank v. Weston*, 172 N. Y. 250; *Gordon v. Ashley*, 191 id. 186), yet here if the jury accepted the testimony of the defendant they might well deem Schwartz unworthy of belief.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, CLARKE and MILLER, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

LOUIS M. SLOMAN, Respondent, *v.* THE STAR COMPANY,
Appellant.

First Department, March 8, 1912.

Master and servant—principal and agent—when subagent cannot bind his principal by contract of employment.

A manager of one of several advertising departments of a newspaper having no authority whatever to hire subordinates except after consultation with the general manager of the advertising department and with his consent, and who had no power to sign any contract of hiring, has no authority to bind his employer by a contract changing a contract employing a subordinate by the week to one employing him by the year without the consent of the general manager.

LAUGHLIN, J., dissented, with opinion.

APPEAL by the defendant, The Star Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of May, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 10th day of May, 1911, denying the defendant's motion for a new trial made upon the minutes.

MacDonald De Witt, for the appellant.

George J. McDonnell, for the respondent.

DOWLING, J.:

In June, 1909, plaintiff was hired as an advertising solicitor in the display division of the advertising department of the *New York American* by Fred C. Veon, manager of said division. His hiring was a weekly one, and the salary paid him was fifty dollars per week. He entered upon the discharge of his duties and performed them until September, 1909, when, having concluded to locate in New York and to lease and furnish an apartment there, he spoke to Veon, telling him of his plans and stating his desire to have a more definite contract for the future. Veon replied that the plaintiff could feel perfectly safe in leasing an apartment up to November 1, 1910, as his position would be assured for that length of time, at the

App. Div.]First Department, March, 1912.

same salary of fifty dollars weekly. Plaintiff requested Veon to confirm the contract in writing, which the latter did in the following letter delivered to plaintiff:

“NEW YORK AMERICAN.
“Sunday American Circulation 800,000.
“Broadway and Park Place.

“Oct. 3, 1909.

“MY DEAR SLOMAN.— You left the office this morning before I had a chance to talk to you regarding your desire to lease an apartment, etc. You will be entirely safe in making a lease for one year from Nov. 1, 1909, for one year, and you may consider this letter a contract for your services until November, 1910.

“Very truly,
“FRED. C. VEON,
“*Adv. Mgr.*”

Plaintiff was discharged on March 12, 1910, and this action is brought to recover his damages, the alleged contract having some seven months more to run. At the end of plaintiff's case, the proof of Veon's authority to make contracts for defendant consisted solely in the fact that he originally hired plaintiff under a verbal contract of weekly hiring, which had been performed upon both sides for some three months; that he was manager of the department of display advertising, one of four branches into which defendant's advertising business was subdivided; that he received reports from the solicitors in his department and gave them orders as to their solicitation of advertisements. Plaintiff admitted that he had never seen Veon hire or discharge any one, and that he knew one Merrill was the publisher of defendant and Veon's superior, having an inclosed office, outside of which Veon and the solicitors had desks.

The defendant established that the treasurer of defendant was William B. Merrill, who was also its general manager; that Veon was his subordinate, constantly consulted with him concerning the business, and was in charge of part of the advertising force; that he was outside of Merrill's office, about six feet distant from him; that he had power to hire and discharge men only after consultation with Merrill; that Veon

First Department, March, 1912.

[Vol. 149.]

had never been authorized to sign a contract of hiring; that he never had informed Merrill that he had signed such a contract or had hired Sloman for a year; that Veon's duties consisted in receiving the reports of the advertising solicitors and assigning them to their work; that the only persons who signed contracts for defendant are its officers; that Veon never hired any one for a year or any fixed period, to Merrill's knowledge; that when the latter signed the payroll containing Sloman's name it was without any knowledge or information that Sloman claimed a yearly hiring; that no head of any department had power to hire or discharge men except after consulting Merrill. None of this testimony was controverted.

Not only does the testimony conclusively establish that Veon had no power or authority, real or ostensible, to make a contract on behalf of defendant for a fixed term of employment, but it further appears that he had no power or authority even a weekly hiring on defendant's behalf, save after consultation with its general manager and with his consent. Furthermore, at the close of plaintiff's case he had failed to show such power or authority, real or ostensible, on the part of Veon to make a contract of hiring for a fixed period, and the motion to dismiss the complaint then made should have been granted. This is not such a case as that of *Cox v. Albany Brewing Company* (24 N. Y. St. Repr. 942; 56 Hun, 489), where the who made the contract of hiring was alone behind the in defendant's office apparently in charge, and then as the court said, "no intimation in the evidence that power was not as ample as his ostensible." Here the tiff had been originally hired from week to week—a condition involving no great liability upon defendant and quite ent with any ordinary conduct of business. His retention under those conditions raised no implication of Veon's to bind the corporation by yearly hiring, when to plaintiff knowledge Merrill was Veon's superior, an officer of defendant in a position of open authority over both, and Veon had powers, even ostensibly, save to receive reports from his ordinates and give them their orders. Plaintiff did not know that he had ever hired or discharged any employee. Under these conditions, this case falls under the rule laid down by

App. Div.]

First Department, March, 1912.

in *Camacho v. Hamilton Bank Note & Eng. Co.* (2 App. Div. 369), where it was held that even in the case of a general manager of a corporation who was proven to have habitually employed and discharged employees, but there was nothing to show that any of the employees thus hired or discharged were more than ordinary servants of the corporation, employed for short periods, and there was no proof that the general manager had made contracts of employment for a fixed period or involving more than temporary employment subject to discharge at volition, the testimony was utterly insufficient to lay the foundation for an inference that the general manager possessed authority to make a contract for a fixed period, in that case three years.

The judgment and order appealed from must, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

MCLAUGHLIN, CLARKE and SCOTT, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

Plaintiff was employed by the defendant's advertising manager and it accepted his employment, and he performed the duties to which he was assigned by the advertising manager, and the defendant paid the salary which the advertising manager agreed to pay for a period of about nine months, and then it discharged him. His employment at first was by the week, but before the end of four months, and before leasing and furnishing an apartment in the city of Greater New York, he determined to obtain a contract by the year, which was a reasonable period of employment for the services he was rendering; and he applied to the advertising manager who had originally employed him, who, after consideration and deliberation, gave him a formal letter of employment for a year on the stationery of the defendant, and his services continued under that employment without its being repudiated or questioned until his discharge. I am of opinion that he was not, as matter of law, put upon inquiry with respect to the advertising manager's authority, and that the jury were justified in find-

First Department, March, 1912.

[Vol. 149.]

ing either that the advertising manager was authorized to employ him for a year, or that the defendant clothed its advertising manager with apparent authority to make the contract and was chargeable with knowledge of the agreement under which plaintiff was induced to remain in its employ.

I, therefore, vote for affirmance.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

JOHN MONKS AND SONS, Respondent, *v.* WEST STREET IMPROVEMENT COMPANY and Others, Appellants.

First Department, March 8, 1912.

Contract — agreement to drive piles — no mutual mistake as to nature of material filling cribs — mistake of one party only — recovery on contract — estoppel to deny terms of contract.

Action by a contractor to recover for extra work necessitated by the fact that he was required to drive certain piles through cribs filled with stone instead of cribs filled with earth. The plan upon which the bid was made showed the existence of cribs and the spaces between the timbers thereof contained the word "earth." It appeared that the existing cribs in order to resist lateral pressure under the circumstances would have to have been filled with stone. The plans did not purport to be a complete representation of the work to be done, but only to show the number of piles to be driven. The plaintiff had been invited to the premises.

Held, that the plaintiff could not recover for extra work done upon ground of mutual mistake as to the nature of the crib filling, but the circumstances was bound to investigate and ascertain the same for itself.

Especially is this so where the memorandum for bidders stated that the information given by the blue prints was all that was "able," and that the typical "crib" foundation shown was only found at a single boring, and in effect that the nature and extent of the cribs was not determinable.

The plaintiff contended that said memorandum to bidders had not been delivered to him by the defendant's engineer. Evidence examined held, that a finding that the memorandum had not been delivered against the weight of evidence.

Moreover, the existence of said memorandum for bidders showing defendant's lack of knowledge of the nature of the crib work of itself is the plaintiff's claim of mutual mistake of fact.

App. Div.] First Department, March, 1912.

To recover because of a mutual mistake of fact it must be shown that both parties to the contract were mistaken.

Where the plaintiff pleaded the contract and has recovered thereon it is estopped from asserting that there was no meeting of the minds on all its terms.

APPEAL by the defendants, West Street Improvement Company and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of January, 1911, upon the report of a referee in an action to foreclose a mechanic's lien.

L. Laflin Kellogg, for the appellants.

William A. Keener, for the respondent.

MILLER, J.:

The defendant John Peirce Company, which for brevity I shall hereinafter refer to as the defendant, contracted to erect a building for the defendant West Street Improvement Company on the west side of West street, between Albany and Cedar streets, in the borough of Manhattan. It invited bids from different contractors for doing the excavating work and preparing foundations, and, pursuant to that invitation, the plaintiff, on September 15, 1905, submitted a proposition in writing to excavate over the entire area of the lot down to the level of thirteen feet eleven inches below the curb, to furnish and drive piles of the number shown on plans exhibited, to excavate for and build concrete piers up to the grillage beams, to shore and underpin adjoining buildings if necessary, to excavate for the boiler pit, and to sheathpile the streets, build sidewalk bridges, and do all necessary pumping for the lump sum of \$77,500, and to drive extra piles, make extra excavation and furnish materials for, mix and place concrete for cellar floor at stated unit prices. The defendant replied in writing, accepting the proposal upon condition that a satisfactory agreement should be signed that the work should be completed before January 1, 1906, and that for each day's delay beyond that time the plaintiff should pay the sum of \$100. It was also proposed that the plaintiff should do certain additional work. Those conditions do not appear to

have been assented to. Nevertheless, without waiting for an agreement to be made and a formal contract to be executed, the plaintiff commenced to excavate for the building. The defendant caused specifications and a formal contract to be prepared, but when that was submitted to the plaintiff it refused to execute it for the reason that it had discovered in the progress of the work rock-filled cribbing where piles had to be driven, which, it claimed, was different from the situation indicated on the blue prints, upon which it had submitted its proposal. Thereupon, the defendant in a letter to the plaintiff stated its position in effect to be that the plaintiff was bound to complete the work in accordance with its proposal, notwithstanding unexpected developments, and suggested that the plaintiff could follow one of two courses: (1) Abandon the work and take the risk of being subjected to damages for breach of contract; (2) complete the work in accordance with the specifications, and if its view turned out to be correct, recover extra compensation on account of the new developments. Without anything more definite being agreed upon, the plaintiff continued the work. The original plans were changed from time to time, requiring extra work which the plaintiff performed.

The plaintiff pleaded in its complaint the contract evidenced by the letter of September 15, 1905, and sought to recover the stipulated lump sum specified in the contract, the stipulated unit prices for extra work and stipulated prices for extra work performed under subsequent modifications of the contract. On the hearing before the referee, the plaintiff was permitted, over the defendant's objection and exception, to introduce evidence in support of its claim that its proposal of September 15, 1905, was submitted under a mutual mistake of fact as to the presence of rock-filled cribbing, and at the close of its evidence was permitted to amend the complaint to conform to the proof. The plaintiff's evidence established the performance of work amounting, according to the stipulated unit prices and lump contract price, to \$103,850.01. It had received \$83,485.98, leaving unpaid the sum of \$20,364.03, which with interest to the time of the judgment amounted to \$25,937.11. The defendant does not question the plaintiff's right to recover that sum. The plaintiff also established without serious dis-

App. Div.] First Department, March, 1912.

pute that the presence of rock-filled cribbing increased the expense of doing the work by the sum of \$23,003.85, which with interest amounted to \$29,299.25. The right to recover the latter sum only is involved on this appeal.

We shall assume that, upon the plaintiff's theory of the case, it could recover in this mechanic's lien suit the sum in dispute as for extra work, and that the admission of evidence to sustain that theory and the subsequent amendment of the pleadings to conform to it were proper, and shall come directly to the merits of the controversy. Negotiations leading up to the commencement of the work were conducted on behalf of the plaintiff by one Charles H. Deans, an engineer. The proposal of September 15, 1905, was signed, "John Monks & Sons, per Chas. H. Deans." Prior thereto, the defendant's engineer had invited Deans to submit a proposal, had furnished him a sketch of test borings made for the defendant, a blue print showing location of test holes and a section showing the position and character of the materials, and had informed him that the defendant had men on the lot digging pits in various places, and had invited him to inspect the premises. The sketch of test borings and the blue print section showed what any one familiar with the location would doubtless have known, even without that information, that the material to be excavated was filled-in or made land upon river mud and sand. Cribbing was indicated, though the extent of it was not shown, and upon the blue print plan there was a sketch showing a vertical section of what was styled "typical old timber foundation," indicating timber crib work, and in the spaces between the timbers, as shown on the sketch, was the word "earth." It is not entirely plain, at least to one who is not an engineer, whether the spaces marked "earth" were intended to represent the interstices between the timbers or the pockets of the crib itself. The plaintiff's theory is that the typical timber foundation shown on the plan indicated earth-filled cribbing; that both parties contracted upon the assumption that that was typical of all the crib work; that its contract required it only to drive piles in earth-filled cribbing, and that it is, therefore, entitled to recover as for extra work the additional expense caused by the stone-filled cribbing. The defendant called

experts who testified that the typical section shown on the plan indicated to them crib work, containing more or less stone. The plaintiff's experts, and even its general manager, who had had considerable experience in excavating along the North river, testified that the typical section shown on the plan indicated an earth-filled crib, but all said that, in their experience in excavating crib work along the North river they had always found more or less stone. They explained that, however, by saying that, if a crib was to be sunk in mud, and was intended only to sustain vertical pressure, it was customary to sink timbers in the mud and at some distance from the bottom to build a flooring and to weight the crib with rock placed thereon. All admitted, however, that to resist lateral pressure, the crib would have to be filled with stones.

A mere glance at the blue print plans suggests that the purpose of the cribbing was to resist lateral pressure, to support the made or filled-in land, and it seems to us that, independently of the plans, that would occur to any one as familiar with the location as the plaintiff was. There is no suggestion of bad faith on the part of the defendant. Indeed, the plaintiff's theory is that of mutual mistake. The defendant gave the plaintiff such information as it had, *i. e.*, the blue prints prepared for it by engineers, showing test borings and the character of materials discovered, but these blue prints did not purport to be a complete representation of all the materials to be excavated or encountered in the driving of piles. The information that men were digging pits, coupled with the invitation to inspect the premises, was notice to the plaintiff that it could not rely upon the blue prints as completely showing the situation. The plans formed no part of the plaintiff's proposal except in so far as they showed the number of piles to be driven. The proposal was not limited to driving piles in, or making excavations of, specified material, and we think that, in view of the fact that the blue print plans did not purport to be a complete representation of the work to be done, in view of the invitation of the defendant to inspect the premises, and in view of the plaintiff's familiarity with the location and presumed knowledge of the probability that stone-filled cribs would be encountered, it was incumbent upon the plaintiff to investigate and ascertain for

itself the situation, or, failing that, to protect itself by limiting its proposal to work of the character indicated by the blue prints. If the proposal had been thus limited, it is altogether probable that some other bidder would have got the contract.

Moreover, the defendant's engineer testified without dispute that he prepared a paper styled "memoranda for bidders" and that he delivered a copy of it to Deans. That memorandum stated that all information *available* was given on accompanying blue prints, specified how far the excavation was to be carried, how concrete was to be made, and called for proposals for specific items of work. It also contained this statement: "Note that the 'typical' crib foundation shown on this plan was found only at boring # 3. At the other points marked 'crib' the wash pipe was stopped by timber but the nature and extent of same was not determined." Deans had died before the trial. The plaintiff's manager testified that he had never seen that memorandum. It is claimed that the positive testimony on direct examination of the defendant's engineer is weakened by the following statement on cross-examination: "It is my recollection that I gave also to each one of these bidders this memoranda for bidders known as Exhibit E. Undoubtedly I did. They had to have that to start on the figures. At this time, our specifications were not prepared." It is also urged that, even if Deans did have the memorandum, his knowledge was not the knowledge of the plaintiff. But that contention overlooks the fact that all of the negotiations on behalf of the plaintiff were conducted by Deans, and that the proposal was made in the plaintiff's name by Deans. Of course if that memorandum was delivered to him, the plaintiff was called upon to ascertain for itself, before submitting a proposal, the character of the work to be done. The referee found that said memorandum was not delivered to Deans. We think that finding against the evidence. It is opposed both to uncontradicted testimony and to the probabilities of the case. But even if it was not delivered to Deans, it is of itself sufficient to refute the plaintiff's claim of mutual mistake. It was concededly in existence. Each of the other bidders testified that he received a copy of it. It establishes beyond peradventure that there was no mistake on the defendant's part. It did not con-

tract on the assumption that only earth-filled cribs would be encountered, and to recover upon the theory of mutual mistake it is not enough to show that one party to the contract was mistaken. It does not necessarily follow from the fact that the defendant was not mistaken that it was guilty of misrepresentation; but we do not need to consider that as no such issue is involved. The evidence and the rules of law applicable to a controversy involving such an issue are very different from those involved in this case.

I have considered the case upon the assumption that the plaintiff's proposal of September 15, 1905, was accepted and became a binding contract. In fact, however, the acceptance was not unconditional, something remained to be agreed upon, and it may be that the plaintiff could have recovered for all the work done on a *quantum meruit*. Under the circumstances disclosed in this case, a recovery on that basis doubtless have been just between the parties. The price was evidently favorable to the plaintiff. At least, it has indicated an eagerness to hold fast to it. It has pleaded the contract and has recovered the stipulated contract price, both the lump sum and the unit prices for the extra work. It has thereby concluded itself from asserting that there was not a meeting of the minds upon all of the provisions of the contract, and it would be manifestly unjust to the defendant to give the plaintiff the stipulated prices and an additional sum for work covered by the contract, but which for unforeseen circumstances cost more than the plaintiff expected.

The judgment should be reversed and a new trial granted with costs to appellant to abide the final award of costs, unless the plaintiff stipulate to reduce the recovery to the amount of \$25,937.11, in which event, the judgment, as modified, be affirmed, with costs to the appellant.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and Dow concurred.

Judgment reversed, new trial ordered, costs to the plaintiff to abide event, unless plaintiff stipulates to reduce as stated in opinion, in which event, judgment, as affirmed, with costs to appellant. Order to be settled.

KATHARINA WERNER, Respondent, *v.* CHARLES J. WERNER,
Defendant.

ANNA THIEL, Corespondent, Appellant.

First Department, March 8, 1912.

Husband and wife — divorce — failure to establish adultery of defendant.

Action for absolute divorce. Evidence examined, and held, insufficient to establish the adultery of the defendant and that an interlocutory judgment for the plaintiff should be reversed.

APPEAL by Anna Thiel, corespondent, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 21st day of April, 1911, upon the decision of the court rendered after a trial at the New York Special Term in an action for divorce.

George A. Gregg of counsel [*Gregg & Frank*, attorneys], for the appellant.

Frederick W. Block, for the respondent.

CLARKE, J.:

The complaint alleges upon information and belief that on or about Thursday of each and every week during the years 1905-6-7, and until the autumn of 1908, the defendant committed adultery with one Anna Thiel at the home of Mrs. Anna Baumann in Woodside, Queens county, N. Y. No attempt was made to prove any transaction under that allegation. The 3d. paragraph of the complaint alleged upon information and belief that between the 1st day of January, 1905, and the commencement of this action, the defendant upon many occasions committed adultery with said Anna Thiel, but at what particular times and places plaintiff is unable to state.

The defendant, the husband, after interposing a verified answer, withdrew his counsel, and submitted to a decree, being present in court upon the trial, and being examined by the plaintiff as to the condition of his property. A defense

First Department, March, 1912.

[Vol. 149.]

was interposed by the corespondent, Mrs. Thiel, and the appeal is taken by her.

Plaintiff served notice that upon the trial she would undertake to prove under the general allegation in paragraph 3 of the complaint a specific act of adultery committed by the defendant with the corespondent named in the complaint in November, 1908, at 253 Arlington avenue, in Jersey City, N. J. This was the only specific act about which evidence was given, and this was given by Emily Dunckelmann, a sister of Mrs. Thiel, and, if believed, was enough to establish the cause of action. She testified that her sister and Mr. Werner called at her house together. "I was just going shopping, and I said I would stay at home, so they told me to go ahead, that I should go out shopping. I intended to go over to New York to the stores, which they said I should do, that they would wait, but on the way I changed my mind, and I went down to Jersey City, * * * and I returned in, I guess, between an hour and a quarter and an hour and a half. * * * When I left home there was nobody in that house except Mr. Werner and Mrs. Thiel. * * * When I came back I found them together in my room, * * * my own private bedroom. When I came up to the door, the door was closed. When I opened the door and looked in the defendant and the corespondent stood in front of my bed. Mr. Werner was clothed in underclothing, that is all he had on. Mrs. Thiel was clothed the same, she only had on what I call a chemise; * * * the bed * * * was mussed up. When I entered the room I didn't say anything. I reproached my sister and said was not she afraid that Mrs. Werner would ever hear of such conduct; that I didn't like anything like that going on, and she said that if Mrs. Werner ever found out about their conduct that they would leave town and she could not do anything. * * * After I found them in the room I went down stairs and prepared coffee. * * * The defendant and Mrs. Thiel both came down stairs after that. They had coffee with me. We had coffee and chatted a while and then they left. They called again after that * * * several times."

The cross-examination of Mrs. Dunckelmann shows that she left her husband after living with him about five years; that there were no children of her marriage; she refused to answer

whether she had any children on the ground that she might incriminate herself; that she had a boarder by the name of Martin with whom she was living; that she had been known for a long time as Mrs. Martin; that she had lived with different men and under different names. She testified: "I thought my sister was able to take care of herself; I didn't consider that it was a proper thing for my sister to be doing. I would not have reproached her—I didn't consider it proper; I didn't say 'be careful,' but I said 'aren't you afraid?' It was not my business; I only told her I did not like it being done in the house. I mean what I suspected — that she had been committing adultery with Mr. Werner, and the only impression that made on my mind was 'aren't you afraid of Mrs. Werner?' * * * and then I went down stairs and made coffee for my sister and Mr. Werner and they came down and I sat there and discussed matters in general with them." And there is a letter of hers in evidence which shows that she had little or no morality. But why should a sister testify against a sister? It seems that all of Mrs. Thiel's family, her mother and sister and brother, had been in litigation with her, first over her husband's will, in which she had succeeded against them all, and then in a suit by her for money loaned, which she also won, and that she had a suit for slander against various members of her family where they had called her a false will maker. It seems, further, that not only was this suit brought for divorce upon information given to the plaintiff by Mrs. Baumann, Mrs. Thiel's mother, but that it was brought by the Baumann's attorney; that upon plaintiff's own testimony the information upon which was made the allegations of the complaint of the acts of adultery upon every Thursday for four years had not been given to her at all at the time she verified the complaint. It also appears that an action for \$10,000 for the alienation of her husband's affections was also brought against her by Mrs. Werner by the same attorney who appears for plaintiff herein; that the plaintiff and the defendant still live in the same house; that a mutual arrangement without the order of the court was made for alimony; that the defendant Werner had been brought up in the family of the Baumans and had been

brought over to this country by them. The correspondent positively and absolutely denies all acts of adultery anywhere at any time.

The learned court in his opinion said : "In view of the relations between the defendant and the correspondent indicated by her letters to him, and testified to by the witness Wulff, I am satisfied with the testimony as to the alleged act of misconduct in Jersey City." Mrs. Thiel explains the letter referred to by stating that there had been a quarrel over some money which she had loaned and that she was asking forgiveness for the language she had used; that their relations had been that of brother and sister for all these years and there was nothing else in it.

The testimony of Mrs. Wulff was admitted under objection and was to the effect that she was the proprietress of the Ardsley Hotel on the corner of Fourth avenue and Thirty-second street, and that she had seen defendant Werner may be three times a month and sometimes twice. "I saw him a dozen times, * * * three or four years ago;" that he would come in the afternoon and engage a room and that Mrs. Thiel would come there and meet him and that they would go into the room and spend two or three hours. She said they were going there for a couple of years. It is claimed that Mrs. Thiel was pointed out to this witness in the court room by these other women, that her testimony was inadmissible to show an act because not particularized, and was unbelievable in any event.

There is another suspicious matter. Mrs. Wulff testified, on being recalled for further cross-examination: "Before Mrs. Werner brought these pictures to me [referring to the photograph of the defendant and Mrs. Thiel] I had a conversation with Mr. Werner, the defendant, * * * in September last, 1910, up at the Ardsley Hotel. It was in the afternoon. He said you know me well, and he said, may be some day he got some trouble and the case comes up, some divorce case. * * * Mr. Werner said this. He said you have to say that I was good and you know us well. I can't swear that he said he wanted a divorce, but all these things he told me. * * * Q. Now, what did you say to him when he said that he would want you to come to court and testify? A. He said to get notice and I

App. Div.]First Department, March, 1912.

would put you on for witness. Q. He said that his wife would put you on for witness? A. He didn't say his wife; he said you get notice that you will be put on as witness. Q. And that you will have to testify that I was here with that lady? A. Yes. Q. Is that what he said to you? A. That is what he said. Q. There is no doubt in your mind that he said that to you? A. No. Q. And after that Mrs. Werner called at your place with these pictures? A. Yes."

We have reached the conclusion that a judgment of divorce should not be granted upon this record. There are too many suspicious and unexplained matters. The previous bitterly contested family litigation; the sweeping allegations of misconduct, information of which was furnished by the mother, with no attempt to substantiate any of them in court; the husband and wife continuing to reside in the same house; the action for money damages for alienation of affections; the withdrawal of all defense by the husband after having submitted a verified answer in which all the charges were denied; the character of the only witness who testified to any overt act; the production of the keeper of the hotel as a witness by the husband; the furnishing photographs to her and the pointing out of the correspondent in court, are some of the things which warrant this court in refusing to accept the testimony as to the one act upon which alone a judgment could be predicated. The interlocutory judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and MILLER, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

First Department, March, 1912.[Vol. 149.]

EDWARD F. McCARTON, as Administrator, etc., of EDWARD McCARTON, Deceased, Plaintiff, *v.* THE CITY OF NEW YORK and the BOARD OF EDUCATION OF THE CITY OF NEW YORK, Defendants.

First Department, March 8, 1912.

Municipal corporations — negligence — nuisance — fall of flagpole erected on school building, city of New York — city not liable — liability of board of education — responsibility for neglect of statutory duties.

The objection that a notice of intention to bring an action against a city did not comply with the statute cannot be taken for the first time upon appeal, where the complaint alleged that due notice as required by law was given, for had the objection been taken at trial the plaintiff could have amended his pleading so as to show full compliance with the statute.

As under the charter of the city of New York the care and control of public school buildings is given to the board of education and as suits in relation to such property must be brought in the name of said board, although the title to the property is vested in the city — of which charter provisions the court will take judicial knowledge — the city itself is not liable for the death of a person caused by the fall of a defective flagpole erected on a school house.

But an action to recover for a death so caused lies against the municipal board of education either upon the theory that the defective flagpole was a nuisance if originally unsafe, or upon the theory of negligence if it was maintained with knowledge that it had subsequently become dangerous.

It seems, the board of education of said city is liable for the neglect of persons whom it employs to perform duties imposed upon it by statute.

MOTION by the plaintiff, Edward F. McCarton, as administrator, etc., for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon the dismissal of the complaint by direction of the court at the close of plaintiff's case on a trial at the New York Trial Term in October, 1911.

Herbert C. Smyth [Roderic Wellman with him on the brief], for the plaintiff.

Loyal Leale [Terence Far'ley with him on the brief], for the defendants.

App. Div.]

First Department, March, 1912.

LAUGHLIN, J.:

Counsel for the defendants attempt to sustain the action of the trial court upon the ground that the complaint fails to allege facts showing a compliance with the requirements of chapter 572 of the Laws of 1886 with respect to filing a notice of intention to bring the action with the corporation counsel and of section 261 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1907, chap. 677) with respect to the presentation of the claim to the comptroller. It is alleged in the complaint that due notice of the accident and of the claim arising thereunder and of plaintiff's intention to bring an action was given as required by law to the comptroller and to the corporation counsel and that more than thirty days have elapsed and that the claim has not been adjusted. The record does not show that this objection was taken on the trial. If it had been there taken the allegations of the complaint are sufficient to warrant an amendment to show full compliance with the requirements of these statutory provisions, and, therefore, the objection cannot prevail here.

On the trial a jury was impaneled and counsel for the plaintiff opened the case. Thereupon counsel for defendants moved separately in behalf of each to dismiss the complaint on the ground that actionable negligence was not shown and in behalf of the city on the further ground that it was not liable for acts or omissions of the board of education. The motions were granted and an exception was duly taken and counsel for plaintiff insisted upon his right to go to trial upon the theory of negligence on the part of each defendant; but he was not permitted to do so and an exception was also taken to the refusal. Counsel for plaintiff now contends that he was entitled to go to the jury not only upon the theory of negligence but also on the ground of liability for a nuisance. After the court dismissed the complaint counsel for plaintiff was not required to ask leave to proceed with the trial, and the rights of his client would have been fully preserved by resting on the exception to the ruling. The only importance to be attached to his request to proceed with the trial is as indicating the theory of the action.

It appears that on the 30th day of October, 1908, the dece-

First Department, March, 1912.

[Vol. 149.]

dent was passing along One Hundred and Sixty-sixth street, a public highway in the borough of the Bronx, New York, and was struck by a flagpole about seventy feet in length, which fell from the roof of the Morris High School adjacent to the public street, and he died from the injuries inflicted. The action is to recover the pecuniary loss sustained by his father.

It is alleged in the complaint that the defendant board of education is a corporation duly organized under the laws of New York, and that both defendants "own and control" the high school, and the land upon which it is erected, for educational purposes; that the decedent's death was caused "by the negligence and wrongful acts of the defendants, their agents and servants, in the erection, maintenance and control of said flag pole and its appurtenances," and that the defendants "maintained said building and the flag pole thereon with the said flag pole in an unsafe, threatening and dangerous condition, for a long period of time prior to said accident, and the defendants had knowledge thereof." Ordinarily these allegations would be sufficient to entitle the plaintiff to go to trial on the theory that he might be able to prove the facts; but where a municipal corporation is a defendant, and its rights, powers and duties in the premises are prescribed by public law of which the court takes judicial notice, the question as to whether it is chargeable with negligence or with having created, or with maintaining a nuisance with respect to a building used for educational purposes is to be determined by the provisions of the statute; and where, as here, it appears that the city could not have erected or maintained the building and that the entire custody and control of the building was in the other defendant, the court was justified in dismissing the complaint as to the city without going through the useless ceremony of receiving proof, or offers to prove, on the part of the plaintiff. By virtue of the provisions of section 1055 of the Greater New York charter the *title* to all property, both real and personal, acquired by purchase, bequest or devise, for school or educational purposes is vested in the city, but the care and control of the property is given to the board of education, and it is expressly provided that suits in relation to such property shall be brought in the name of said

App. Div.]

First Department, March, 1912.

board. Section 1064 of the charter (as amd. by Laws of 1903, chap. 43) provides that the board of education shall submit estimates of funds required for educational purposes for each fiscal year, and that it shall administer the moneys appropriated or available for such purpose. Section 1066 authorizes it to lease property required for educational purposes. Section 1067 authorizes the board of education to appoint a superintendent of school buildings and other subordinates and to suspend or remove them for cause, and section 1068 authorizes it to prescribe their duties, and sections 1071 and 1073 give the board directly, and through its appointee, the superintendent of school buildings, who is declared to be its executive officer and subject to the by-laws, control of the selection and acquisition of sites, and the preparation of plans for and erection of new buildings for school purposes and the alteration and repair of existing buildings; and the duty is expressly enjoined upon it to make such provision by its by-laws "as will secure prompt and efficient service for the * * * erection of new buildings for school purposes, and for the alteration and repair of existing buildings." It is quite evident from these statutory provisions that the city could not be responsible for the acquisition or erection, or maintenance of the school building in question, and, therefore, it is not liable on the theory that it has erected or was maintaining a nuisance (see *Uggla v. Brokaw*, 117 App. Div. 586), and it follows that the city is not liable on the theory of negligence for the acts or omissions of the board of education. (*Ham v. Mayor*, 70 N. Y. 459.)

I am of opinion, however, that the complaint states a good cause of action against the board of education. If it erected or maintained this flagpole, which was unfit for the purpose in that it was rotten and never should have been selected for such use, in a position to endanger the lives of those lawfully in the vicinity of the building, with notice, as alleged and as stated in the opening, that it was in an unsafe condition, it is clearly liable, either upon the theory of having erected or of maintaining a nuisance, depending upon whether the original erection was unsafe, or the flagpole was maintained with actual knowledge that it was in a dangerous condition, or upon the theory

First Department, March, 1912.

[Vol. 149.]

of negligence, depending upon its failure to perform its statutory duty to provide for "prompt and efficient" repairs. (*Ahern v. Steele*, 115 N. Y. 203; *Uggla v. Brokaw*, *supra*; *Wahrman v. Board of Education*, 187 N. Y. 331; *Bassett v. Fish*, 75 id. 303.) Here, not only was the power given to the board of education to determine whether or not the school building should be used, but with respect to construction, alterations and repairs, and for its own negligence, at least, it is clearly liable. (Dillon Mun. Corp. [5th ed.] 2889; *Higbie v. Board of Education*, 122 App. Div. 483.) I do not deem it necessary at this time to consider at length whether the *dictum* in *Wahrman v. Board of Education* (*supra*), to the effect that the rule of *respondeat superior* does not apply to the board of education with respect to any of its "subordinate officers or servants" is sound and should be followed, but it would seem that the board must be liable for the neglect of those whom it employs to perform duties, not devolving on such employees, but upon it by statute. (See *Higbie v. Board of Education*, *supra*; *Bieling v. City of Brooklyn*, 120 N. Y. 98, 105 *et seq.*; *Moest v. City of Buffalo*, 116 App. Div. 657; affd., 193 N. Y. 615.)

It follows, therefore, that the exceptions to the dismissal of the complaint as against the city should be overruled and judgment directed for the city, and the exceptions to the dismissal as to the board of education sustained and a new trial granted, with costs to appellant to abide the event.

CLARKE, McLAUGHLIN, SCOTT and MILLER, JJ., concurred.

As to the city, exceptions overruled and judgment ordered for the city; as to the board of education, exceptions sustained and new trial ordered, costs to plaintiff to abide event. Order to be settled on notice.

JAMES MILES, Respondent, *v.* TERRY & TENCH COMPANY,
Appellant.

First Department, March 8, 1912.

Negligence — injury by fall of derrick boom — accident caused by failure to inspect — erroneous charge — improper use of derrick — appeal — new trial — submission of case on erroneous theory.

Where personal injury caused by the boom of a derrick rented to the plaintiff's master by the defendant, who furnished the engineer and another man for operating it was caused not by the negligent operation of the appliance, but, on the contrary, was due to a failure to inspect the appliance which might or might not have disclosed the fact that a key in the braking apparatus had worked loose, it is error to allow the jury to find the defendant negligent in failing to exercise due care in using the derrick, for the only basis for negligence was the failure to inspect and repair.

For such error a new trial will be granted although there is no exception to the charge, for the jury might have found that a proper inspection would not have revealed the looseness of the key.

APPEAL by the defendant, the Terry & Tench Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of April, 1911, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the same day denying the defendant's motion for a new trial made upon the minutes.

James B. Henney [Owen F. Hughes with him on the brief], for the appellant.

Cornelius J. Earley [S. J. Bischoff with him on the brief], for the respondent.

LAUGHLIN, J.:

This action is brought to recover damages for personal injuries sustained by plaintiff on the 8th day of November, 1908, while in the employ of one Bonner, and in the performance of duty, giving signals to an engineer in charge of a hoisting engine on a floating derrick used in unloading earth from a scow and dumping it for filling, in the construction of a dock

First Department, March, 1912.

[Vol. 149.]

at Oak Point, on the East river, at the foot of East One Hundred and Sixty-second street. One McPherson was interested with Bonner in the work and in the profits. The derrick and hoisting apparatus were owned by defendant and rented to Bonner under a contract by which defendant also furnished the engineer and another man, and received twenty or twenty-two dollars per day for the use of the scow, hoisting engine and derrick, and for the services of the two men. Bonner provided the bucket which was used to hoist the earth, and furnished the coal to run the engine. Immediately preceding the accident plaintiff signaled the engineer to raise the bucket and swing it over to the dumping ground, and this signal having been obeyed, he gave another signal at the proper time to empty the bucket. The engineer attempted to obey that signal by applying a friction brake, but the lever which controlled the brake failed to respond, owing to the fact that a key which held the lever of the friction brake to the shaft had worked loose and slipped out. This failure of the machinery to operate properly and the efforts of the engineer, in the emergency, to control it, resulted in the bending or breaking of the boom of the derrick, causing it to strike and injure plaintiff. It was the duty of the engineer to inspect the machinery and appliances, including said key. The evidence tends to show that the key became loose and worked out gradually, and would have warranted the jury in finding that by proper inspection it would have been discovered that it was working loose sufficiently long before the accident to have afforded reasonable time for repairs. The accident occurred on a Sunday morning, after the machinery had been in operation only a few minutes. The issues became somewhat confused by an effort, on the part of the defendant, to show that the work was prosecuted on Sunday without its knowledge or consent, and pursuant to an arrangement between its engineer and Bonner and McPherson, by which the latter agreed to pay the engineer for the overtime. This evidence does not purport to show an agreement made with the engineer for the use of the hoisting engine and appliances for Sunday, and it is fairly to be inferred that it was contemplated that the defendant should be paid the same as for the use of the machinery and services

App. Div.]

First Department, March, 1912.

of its employees on other days, but that there would be an additional charge referred to as pay for overtime, on account of working Sunday, and that McPherson had agreed to pay the defendant's engineer for all charges for overtime on the work. It is scarcely susceptible of the construction that the engineer was to be fully paid by McPherson for the services rendered on Sunday. That evidence, however, is not very material, for the reason that the accident was not caused by *negligent operation* of the hoisting machinery and appliances on the morning of the accident, which would give rise to a question as to whether the engineer was, in the circumstances, still to be regarded as in the employ of the defendant, or whether his services were taken over by Bonner and McPherson for that day, under the ruling of *Higgins v. Western Union Telegraph Co.* (156 N. Y. 75) and kindred authorities. The negligence which caused the accident was failure to properly inspect the machinery and appliances. That duty devolved on the engineer, and in performing it he was acting for the defendant, and the evidence tends to show that a proper inspection on Saturday would have disclosed the fact that the key was out or was working loose. The case, however, was not submitted to the jury on that theory, although there is no attempt to sustain the verdict on any other theory. The learned trial court evidently was of opinion that since the plaintiff was not in the employ of the defendant, it could not be said that the defendant owed him any duty to inspect the machinery and appliances. The court in the charge drew attention to the evidence with respect to inspection, and counsel for defendant evidently understood the court to instruct the jury that it was the duty of the defendant to inspect the machinery, and he took an exception to the charge on that point and expressly stated that it was taken upon that theory, whereupon the court stated that the jury had not been instructed that there was any duty on the part of defendant to inspect the machinery, and that the question for the jury to determine was whether the defendant exercised such care and caution "in using that instrumentality which a prudent man would consider necessary under all the circumstances of the case to prevent" harm to one in plaintiff's position, which is

First Department, March, 1912.

[Vol. 149.]

in substance the same as the main charge, with the exception of the reference to the evidence relating to inspection. This was the last instruction given to the jury on the subject, and it is evident that the jury were permitted to predicate negligence, not upon a failure to inspect and repair, which was the only failure of duty, but upon the failure to exercise proper care in using the machinery and appliances, or in furnishing them originally, and, although the point is not presented by exception, we are of opinion that there should be a new trial, for the reason that the jury might have found that proper inspection would not have revealed the looseness of the key.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

McLAUGHLIN, CLARKE and MILLER, JJ., concurred.

INGRAHAM, P. J.:

I concur in result on the ground that the finding that the defendant was negligent is against the evidence.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

SAMUEL KEARNEY, Respondent, *v.* HENRY L. HANLIEN, Doing Business under the Firm Name and Style of HENRY HANLIEN & SON, Appellant.

First Department, March 8, 1912.

Master and servant — negligence — injury by revolving derrick — safe place to work — when rule not applicable — change of conditions by servants — assumption of risk — action at common law — Labor Law.

Ordinarily the duty of a master to furnish his servants a safe place in which to work applies to permanent conditions. It does not apply where the place itself is safe but is rendered unsafe by the negligence of fellow-servants.

Thus, where employees in a stoneyard were constantly required to change the position of heavy blocks of stone and placed one of them so near to a revolving derrick that the plaintiff, an employee of thirteen years' experience at the work, was caught between the stone and part of

App. Div.] First Department, March, 1912.

a house at the base of the derrick when it revolved, the master cannot be charged with liability in failing to furnish a safe place to work. Moreover, considering the length of time the plaintiff had worked in the yard under similar conditions and as he had operated the derrick himself, he was chargeable with knowledge that he might be caught in the manner aforesaid, and when he placed himself in the position where the accident might occur he assumed the risk, the action being at common law.

Section 202 of the Labor Law relating to assumption of risk has no application where the action is at common law. But, *it seems*, that where said statute is applicable it only requires the submission of the assumption of risk to the jury in the first instance and the court may still set aside the verdict on that issue as against the weight of evidence.

APPEAL by the defendant, Henry L. Hanlien, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of July, 1911, upon the verdict of a jury for \$1,500, and also from an order entered in said clerk's office on the 18th day of July, 1911, denying the defendant's motion for a new trial made upon the minutes.

E. Clyde Sherwood [Allen E. Brosmith and William B. Davis with him on the brief], for the appellant.

William A. Reynolds, for the respondent.

LAUGHLIN, J.:

The action is brought to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant on the 19th day of July, 1909, in a stoneyard on premises known as 400-417 One Hundred and First street. The liability is predicated wholly upon the common law. It is charged that the defendant failed to furnish the plaintiff a safe place in which to perform his duties and a sufficient number of fellow-servants, and operated a derrick negligently constructed, and failed to promulgate and enforce necessary rules for the safety of the plaintiff. The answer put in issue the allegations of the complaint charging the defendant with negligence, and further pleaded that the plaintiff, with full knowledge of the conditions, assumed the risk of injury from the cause which resulted in the injuries of which he complains.

The plaintiff had been employed in the yard for a period of

First Department, March, 1912.

[Vol. 149.]

about thirteen years, during which time the conditions remained substantially the same. His duties were not confined to any particular work, but he did any work required in the yard, which was used for cutting and dressing blocks of stone weighing from ten to sixteen tons. There was a boom derrick operated by electricity in the center of the yard, and all the blocks of stone in the rough were brought in and deposited near it and left there until it became necessary to move them to other points to be sawed, cut or dressed. The base of the mast of the derrick and the electric controller and levers and drum were inclosed in a small octagonal building, with a door on either side and three windows. The derrick was operated by an engineer who stood within the inclosure. The floor of this octagonal building was four and one-half feet above the ground, and at each door there were three steps leading from the ground into the building. Each door formed one of the octagonal sides of the building, and three of the other sides were solid, and the windows were in the remaining three. About on a level with the floor, and at the angle of each door and the next octagonal side on the right-hand side of the door as one entered, a piece of timber projected out beyond the angles of the building eleven inches. The other dimensions are not given, but these projections are described as knobs, and at the outer end of each a brace running from it to the boom was fastened. A block of stone weighing about fourteen tons had been brought to the yard and left on the ground, with the end towards the engine house, and quite near to it. The plaintiff and a fellow-employee were directed by the foreman to have this block of stone moved to another place in the yard, and after they had passed a chain around the stone and while plaintiff was engaged in removing some lumber so that the stone would swing clear when hoisted, the derrick revolved a distance of a quarter of a circle and pinned him between the stone and one of these knobs, injuring him severely. The engine house revolved with the arm of the derrick, and made a complete revolution in twenty seconds, and thus from the time it started until it came in contact with the plaintiff only about five seconds elapsed. No signal was given that the derrick would be revolved, and, owing to the other noises in the yard, the

App. Div.]First Department, March, 1912.

plaintiff did not hear it moving. According to the testimony of the plaintiff the custom was, for men desiring to have the derrick swung to a particular place, to give the engineer a signal when they were ready; and the evidence shows that neither the plaintiff nor his fellow-workman signaled the engineer to move it on this occasion, and that the engineer moved it on his own responsibility. The engineer testified that when he saw the chainers, as they are called, preparing to have a stone moved, it was customary for him to swing the arm of the derrick around to move the same without any signal. The construction of the engine house was such that, from the position occupied by the engineer in the performance of his duty, he was unable to see the plaintiff at the time of the accident or to discover that the plaintiff was in a position of danger.

The court submitted the case to the jury upon the theory that it was a question of fact for the jury to determine whether the defendant should have made rules regulating the duties of his employees, or requiring the giving of notice or warning to those exposed to danger of injury from the derrick, and in that connection the court instructed the jury that if the plaintiff knew the danger he was quite as negligent in placing himself in a position of danger as was his employer, but left it to the jury to determine whether the plaintiff knew and appreciated the danger. The jury were further instructed that the engineer was a coservant, and there could be no recovery for any negligence on his part, but that if the engineer and the defendant were both negligent, then there might be a recovery. On the question of assumption of risk, however, the court instructed the jury, in effect, that no risk is assumed by the servant until the master has performed the duties devolving upon him. The court also, at the request of the attorney for the plaintiff, instructed the jury that "it was an absolute duty on the part of the defendant to furnish the plaintiff with a safe place to work and he cannot delegate that duty;" and counsel for the defendant duly excepted.

This was the last instruction given by the court. I am of opinion that it was erroneous, as applied to the facts of this case. The place in which the plaintiff was working was con-

First Department, March, 1912.

[Vol. 149.]

stantly changing with the movement of material about the yard. The injury was not owing to the fact that a safe place for the performance of his work was not furnished and maintained by his employer. The doctrine of safe place ordinarily applies only to permanent conditions. It has no application where the place itself is safe, but is rendered unsafe by the negligence of other employees. For instance if a man should be placed at work where another employee in charge of a team may drive a wagon against him, that does not constitute the place an unsafe one within this doctrine. The place here was a stone yard. It did not give way or cave in. No fixed structure or appliance collapsed or toppled over. The men in charge of the work of moving these heavy stones about to be sawed and dressed, could place them where they saw fit. These were details of the work for which the master cannot be held responsible. If the men saw fit to place a large block of stone so near this octagonal building that its projecting angles when revolving would pinion them between the engine house and the stone, or so near that the two projections described would likewise pinion them, those were risks of the business which, at common law, were assumed by the employee. In view of the length of time plaintiff had worked in this yard, under like conditions and of the fact that at times he had operated the derrick himself he was chargeable with knowledge not only that the engine house was there, but that its projections might, when it was revolved, pinch or pinion him, if he placed himself between a block of stone and the revolving derrick sufficiently near, and, therefore, at common law he assumed the risk as matter of law. (*Powers v. N. Y., Lake Erie & W. R. R. Co.*, 98 N. Y. 274; *Gibson v. Erie R. Co.*, 63 id. 449; *De Forest v. Jewett*, 88 id. 264.) It is not claimed that section 202 of the Labor Law (Consol. Laws, chap. 31; Laws of 1909, chap. 36), which changes the common-law rule of assumption of risk and makes it a question of fact for the jury, is applicable to this case, and it is, therefore, unnecessary to express any opinion thereon; but it may be observed that if it were applicable, it would only require the submission of the question to the jury in the first instance, which has been done here, and the verdict might still be set aside as against the

App. Div.] First Department, March, 1912.

weight of evidence on that point, and should be even if the statute were applicable.

It follows that the judgment and order should be reversed, and a new trial granted, with costs to appellant to abide the event.

MCLAUGHLIN and CLARKE, JJ., concurred; INGRAHAM, P. J., and MILLER, J., concurred on the ground that there was no evidence to justify a finding that the defendant was negligent.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

In the Matter of Proving the Last Will and Testament of
HERMAN BERGDORF, Deceased.

GUARANTY TRUST COMPANY OF NEW YORK, Petitioner, Appellant; WILLIAM JUNGHANS and GUSTAV ENGELKE, Executors, etc., of HERMAN BERGDORF, Deceased, Respondents.

First Department, March 8, 1912.

Corporations — merger and consolidation distinguished — will — executors and trustees — appointment of trust company — effect of merger with other trust company.

There is a distinction between a consolidation and merger of corporations. Upon a consolidation a new corporation comes into existence, and the prior corporations cease to exist. Upon a merger the existence of one of the corporations is continued without the formation of a new corporation, the others being merged in it. The continuing corporation becomes the successor of the merged corporations subject to the rights and obligations imposed by statute.

Where a will named as executors and trustees two individuals and a certain trust company "and the survivors and successors of them," a trust company into which the company name was merged, pursuant to the Banking Law prior to the death of the testator, is entitled to act as executor and trustee.

APPEAL by the petitioner, the Guaranty Trust Company of New York, from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 26th day of April, 1911, denying the appellant's petition for

First Department, March, 1912.

[Vol. 149.]

letters testamentary as one of the executors of the last will and testament of Herman Bergdorf, deceased.

Charles Howland Russell [*Russel S. Coutant* with him on the brief], for the appellant.

Herbert C. Brinckerhoff [*John Patterson* with him on the brief], for the respondents.

LAUGHLIN, J.:

The will was made on the 2d day of November, 1904, and by the 7th clause thereof the testator nominated and appointed as executors of the will and trustees of the trusts therein created, two individuals, one of whom he referred to as "my friend," and the Morton Trust Company, and after these designations the sentence ended as follows: "all of the city of New York, in the State of New York, and the survivors and successors of them." The Morton Trust Company was duly merged into the Guaranty Trust Company of New York, the appellant, pursuant to the provisions of sections 36 to 40, inclusive, of the Banking Law (Consol. Laws, chap. 2; Laws of 1909, chap. 10), on the 27th day of January, 1910, and the testator died on the 17th day of January, 1911. The will has been duly admitted to probate and letters testamentary have been issued to the individual executors and trustees. A petition for letters was duly presented by the appellant, claiming to be entitled thereto on the ground that it is the successor of the corporate executor and trustee named in the will, and the application was denied and it appealed. Section 36 of the Banking Law, which clearly and concededly authorized the merger of the Morton Trust Company into the appellant company, prescribes the method of merger, which is, in substance, that the board of directors enter into an agreement under seal, subject to the approval of the Superintendent of Banks, which may provide that the two or more corporations merged may continue to have the name of one of them. Section 37 provides for the submission of the merger agreement to the stockholders and for the proceedings at the meeting of the stockholders to vote thereon, and for the filing and preservation of the records thereof, and the vote of stockholders essential to a merger, and further pro-

App. Div.] First Department, March, 1912.

vides that if such vote be cast the merger shall become effective pursuant to the agreement. Section 39 declares the effect of the merger as follows: "Upon the merger of any corporation in the manner herein provided all and singular the rights, franchises and interests of the said corporation so merged in and to every species of property, real, personal and mixed, and things in action thereunto belonging shall be deemed to be transferred to and vested in such corporation into which it has been merged, without any other deed or transfer, and said last named corporation shall hold and enjoy the same and all rights of property, franchises and interests in the same manner and to the same extent as if the said corporation so merged should have continued to retain the title and transact the business of such corporation; and the title and real estate acquired by the said corporation so merged shall not be deemed to revert by means of such merger or anything relating thereto."

Section 40 declares the rights of creditors and others having relations with the merged corporations as follows: "The rights of creditors of any corporation that shall be so merged shall not in any manner be impaired by any such merger, nor shall any liability or obligation for the payment of any money due or to become due, or any claim or demand, in any manner or for any cause existing against such corporation, or against any stockholder thereof, be in any manner released or impaired, and all the rights, obligations and relations of all the parties, creditors, depositors, trustees and beneficiaries of trusts shall remain unimpaired by the merger; but such corporation into which the other or others shall be merged shall succeed to all such relations, obligations, trusts and liabilities and be held liable to pay and discharge all such debts and liabilities, and to perform all such trusts of the merged corporation in the same manner as if such corporation into which the other shall become merged had itself incurred the obligation or liability or assumed the relation or trust, and the stockholders of the respective corporations so entering into such agreement shall continue subject to all the liabilities, claims and demands existing against them as such at or before such merger, and no suit, action or other proceeding then pending before any court or tribunal in which any

First Department, March, 1912.

[Vol. 149.]

corporation that may be merged is a party shall be deemed to have abated or discontinued by reason of any such merger, but the same may be prosecuted to final judgment in the same manner as if the said corporation had not entered into the said agreement, or the said last named corporation may be substituted in the place of any corporation so merged as aforesaid, by order of the court in which such action, suit or proceeding may be pending."

We agree with the contention of the learned counsel for the appellant that there is a marked difference under our statutes between the *consolidation* and the *merger* of two or more corporations, and that upon a consolidation a new corporation springs into existence and the prior corporations are dissolved and cease to exist (*People ex rel. New York Phonograph Co. v. Rice*, 57 Hun, 486; affd., 128 N. Y. 591; *People v. New York, C. & S. L. R. R. Co.*, 129 id. 474; Business Corp. Law [Consol. Laws, chap. 4; Laws of 1909, chap. 12], §§ 7-11; Railroad Law [Consol. Laws, chap. 49; Laws of 1910, chap. 481], §§ 140-155. See, also, *Railroad Co. v. Georgia*, 98 U. S. 359), while under the statutes authorizing a merger of corporations, one is continued without the formation of a new corporation and the others are merged in it. (*Railroad Co. v. Georgia, supra*; *Lee v. Atlantic Coast Line R. Co.*, 150 Fed. Rep. 775.) The Legislature must be presumed to have known these well-recognized distinctions, and, by omitting any reference to *consolidation* in the Banking Law and providing merely for a *merger* of banking corporations, it must have intended to preserve such distinctions. The corporation, therefore, the name of which is continued and into which the others are merged becomes the successor of the merged corporations, subject to the rights conferred and the obligations imposed by statute.

It is further contended by the learned counsel for the appellant that the history of these sections of the Banking Law and of amendments thereto is such as to indicate a legislative intent that the right which the merged corporation had to become one of the executors and trustees of the will was conferred upon and continued in the appellant company by virtue of the statutory provisions. We refrain from expressing an opinion upon that important question at this time, for, as we view the

App. Div.]First Department, March, 1912.

record, it is not necessarily presented for decision. It is sufficient, we think, to establish the right of the appellant to letters testamentary that it is the *successor* of the Morton Trust Company, for the testator not only designated the Morton Trust Company his executor and trustee but *its successors* as well. The word "survivors" was used, which could have reference only to the individual executors and trustees, and the word "successors" was used, which could relate only to the corporate executor and trustee. It is contended that this provision of the will and other references therein to "successors" are susceptible of the construction that they refer to appointments by the Surrogate's Court pursuant to the provisions of the Code of Civil Procedure (§§ 2605, 2692, 2693, 2818) of successors to executors and trustees in certain instances. He was appointing his executors and trustees, and he is presumed to have known the law, which then provided for the appointment of *successors*, not by him but by the court in certain instances, and also in effect that the Morton Trust Company might go out of existence in name but that its functions might continue and be performed by a corporation into which it merged, which would become its successor; and it is the more reasonable view that he desired such successor to become an executor and trustee under the will. The fact that he used the plural number in each case which was inapplicable does not, I think, destroy the argument, for there is no construction which affords an explanation of the use of the plural number.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the prayer of the petition granted, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, CLARKE and MILLER, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and prayer of petition granted, with ten dollars costs.

NATHAN C. MELLEN, Respondent, *v.* ATHENS HOTEL COMPANY, Appellant, Impleaded with E. E. PAUL COMPANY, Respondent.

First Department, March 8, 1912.

Pleading — mechanic's lien — claim of defendant against codefendant — right of codefendant to answer — statute construed — trial — when cause noticed by plaintiff should not be stricken from calendar.

It is the intent of the statute that all controversies arising out of mechanics' liens filed against the same lands shall be determined and disposed of in a single suit, as is shown by the provision that if more than one suit be brought, they shall be consolidated.

The statute provides that controversies between codefendants shall be determined. And where the answer of one defendant makes a claim upon a codefendant rather than upon the plaintiff, the answer is in effect in the nature of a complaint to which the codefendant may interpose an answer which claimant will be required to receive. Such claim against a codefendant is not an allegation of new matter in an answer to which a reply is not required upon the ground that it is deemed to be controverted.

A suit to foreclose a lien, at issue so far as the plaintiff is concerned, will not be stricken from the calendar and the plaintiff's judgment delayed because a defendant by answer makes a claim against a codefendant, for an answer of a codefendant may properly be made twenty days before trial, although the plaintiff has served notice of trial and put the cause upon the calendar.

APPEAL by the defendant, the Athens Hotel Company, from an order of the Supreme Court made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of January, 1912.

Alexander Thain, for the appellant.

William W. Robison, for the defendant, respondent.

SCOTT, J.:

This is an appeal by defendant Athens Hotel Company from an order denying its motion that the defendant E. E. Paul Company be required to accept appellant's answer and that the cause be stricken from the calendar. The action is to foreclose a mechanic's lien upon a hotel owned by the appellant. Plaintiff's lien was filed July 25, 1911. The defendant E. E. Paul Company had filed a lien on July 16, 1911, and was necessarily

App. Div.]First Department, March, 1912.

made a party defendant. (Lien Law [Consol. Laws, chap. 33; Laws of 1909, chap. 38], § 44.)

On December 7, 1911, the defendant E. E. Paul Company served upon appellant its answer, in which it claimed a judgment for a considerable sum of money alleged to be due under its contract for the reconstruction of appellant's hotel. On December twenty-sixth the hotel company served an answer upon E. E. Paul Company in which it not only undertook to controvert the claim of said Paul Company to recover, but asserted counterclaims for damages arising out of its contract with said Paul Company to an amount much exceeding the claims of the latter company. It is this answer which the Paul Company has returned and of which appellant now seeks to compel acceptance.

The Lien Law not only requires that all lienors shall be made parties to an action commenced by any one to foreclose his lien, but also provides that: "Every defendant who is a lienor shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless the lien is admitted in the complaint, *and not contested by another defendant.*" (§ 44, subd. 3.) And by section 45 it is provided that: "The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine *all issues* raised by any defense or counterclaim in the action." The plain intent of the law is that all controversies arising out of liens filed against the same property shall be determined and disposed of in a single action, and such intent is made even more clear by the provisions of section 43, providing that if more than one action is brought they shall all be consolidated. It thus happens very often, as in the present case, that there are several controversies to be tried, arising between codefendants, and as to which the plaintiff has no interest. Under our method of practice a controversy must arise upon pleadings setting forth the claims of the contesting parties, and to meet the case of a controversy between codefendants the Code of Civil Procedure has provided, in section 521, as follows: "Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer;

First Department, March, 1912.

[Vol. 149.]

and must at least twenty days before the trial serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants so to be affected who have not duly appeared therein by attorney. The controversy between the defendants shall not delay a judgment, to which the plaintiff is entitled, unless the court otherwise directs."

It was under this section that the E. E. Paul Company served its answer on appellant, the owner, and therein set forth its lien and stated the particulars of its claim thereon. This was undoubtedly the proper practice. The Paul Company now objects, however, that there is no provision under which the appellant may also serve an answer controverting the claims of its codefendant. Its position is that there can be no such thing as an answer to an answer, and that there is no necessity for it because, under section 522 of the Code of Civil Procedure, an allegation of new matter in an answer, to which a reply is not required, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires.

In presenting this argument the respondent overlooks the peculiar character of an action of this kind which may comprise a number of unrelated controversies between the several parties defendant. As between respondent and appellant the former stands in the relation of a plaintiff, and its pleading, although termed an answer, is, so far as concerns appellant, in the nature of a complaint. To such a pleading it is appropriate and proper that appellant should interpose a pleading in its own behalf, to the end that the issues between these parties may be stated and defined. Furthermore, the appellant is entitled to assert its counterclaim against respondent arising out of the same contract which serves as a foundation for respondent's lien and claim, for by section 45 of the Lien Law (*supra*) it is clearly contemplated that such a counterclaim shall be passed upon and disposed of in this action. To assert such a counterclaim a pleading setting it forth was essential. We are, therefore, of the opinion that the appellant was entitled to serve its answer, and that respondent should be required to receive it. It is not necessary to strike the cause from the calendar. It was at issue so far as plaintiff is concerned, and

App. Div.]

First Department, March, 1912.

it is provided by section 521 of the Code of Civil Procedure that a controversy between defendants shall not delay a judgment to which plaintiff is entitled unless the court shall otherwise direct. That section places no limitation upon the service of an answer upon a codefendant, except that it must be at least twenty days before the trial, so that in many cases such an answer may properly be served after the plaintiff has noticed the action for trial and put it upon the calendar.

The order appealed from must, therefore, be reversed, with ten dollars costs and disbursements, and the motion granted to the extent hereinbefore indicated.

CLARKE, McLAUGHLIN, LAUGHLIN and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted to extent stated in opinion. Order to be settled on notice.

PEYTON R. McCARGO, Respondent, *v.* ANDREW JERGENS and CHARLES H. GEILFUS, Appellants. (Action No. 2.)

First Department, March 8, 1912.

Judgment — action on contract — res adjudicata — rights accruing subsequent to prior judgment.

Action to recover money alleged to have become due under a written contract whereby the defendant, upon the performance of certain acts by the plaintiff, agreed to pay a sum of money, and further stated sums at subsequent dates to obtain and continue the employment of plaintiff for a term of years at a certain salary, and containing a provision that on the termination of the employment "for his [the plaintiff's] fault" certain obligations for payments not due should become null and void. On a former action on the same contract, the issue being whether plaintiff was discharged "for his fault," judgment having been rendered for the plaintiff, a certain item of damage was stricken out upon appeal upon the ground that the right thereto had not accrued when the action was commenced.

On a second action to recover said sum, *held*, that the former judgment conclusively established that the plaintiff had been discharged without his fault, but that the contract, not being one exclusively for services, his entire rights were not determined by the prior judgment so that he might recover the sum subsequently becoming due.

First Department, March, 1912.

[Vol. 149.]

APPEAL by the defendants, Andrew Jergens and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of November, 1911, granting the plaintiff's motion for judgment on the pleadings, and also from the judgment entered thereon in said clerk's office on the 9th day of November, 1911.

George W. Schurman, for the appellants.

Eliphalet W. Tyler, for the respondent.

SCOTT, J.:

The action is for the sum of \$2,000 alleged to have become due to plaintiff on January 18, 1908, under a written contract which is annexed to and made part of the complaint. By this contract, dated January 16, 1904, the plaintiff agreed (1) to transfer to defendants one share of stock in the Woodbury Dermatological Institute of New York; (2) to release the Andrew Jergens Company from all agreements entered into prior to the date of the contract; (3) to release all claims to a contract wherein the Andrew Jergens Company agreed to pay to plaintiff all dividends on twenty shares of stock of the Woodbury Dermatological Institute for a period of eight years from January 13, 1902, and (4) to resign as director and president of the Woodbury Institute on the written request of the defendants.

In consideration of these acts to be performed by plaintiff, and which have been performed, the defendants agreed (1) to pay plaintiff \$5,000 in hand; (2) to pay him \$1,000 on January 18, 1907, \$2,000 on January 18, 1908, and \$2,000 on January 18, 1909, all of said sums to bear interest from the date of the contract, payable annually, and (3) to obtain and continue the employment of plaintiff as manager of the John H. Woodbury Dermatological Institute for a term of five years at a salary of \$5,000 for the first year and \$6,000 per year for the next four years, plaintiff agreeing to devote his entire time and use his best efforts in the performance of the duty imposed upon him under such employment. It was further provided that in the event of the death of plaintiff, or the termination of said

App. Div.]First Department, March, 1912.

employment *for his fault* then the said three, four and five year payments above provided for, so far as the same have not become payable, shall become null and void, but otherwise said payments shall be made when due.

The present action is to recover the installment of \$2,000, which by the terms of the contract became due and payable on January 18, 1908. Both parties plead and rely upon a judgment in a former action between them, and the determination of this appeal rests upon the effect to be given to that judgment. That action was begun on March 9, 1907, before the installment now sued for became payable. The complaint in that action set forth the contract above referred to and alleged that defendants had so far fulfilled it as to pay to plaintiff the down payment of \$5,000, and had obtained and continued the employment of plaintiff as required by the terms of said contract, and that plaintiff had received from the Woodbury Institute the sum of \$5,000 for services rendered to said institute up to and including on or about the 1st day of January, 1905; that plaintiff had performed all the terms of the contract by him to be performed, and had duly devoted his entire time and used his best efforts in the performance of the duties imposed upon him by said institute under his said employment. It was further alleged that in the month of December, 1904, the said Woodbury Institute discharged plaintiff from said employment *without his fault*, and that said discharge was with the knowledge, consent, acquiescence, connivance and procurement of defendants. The judgment demanded was for the damages resulting from the breach of defendants' agreement to continue plaintiff in the employment of the institute and for the \$1,000 cash installment, which by the terms of the contract became payable on January 18, 1907, and for interest upon the deferred cash payments. The answer put in issue the allegation that plaintiff's discharge was without his fault, and alleged, on the contrary, that he had been discharged for his fault and for good cause. This was the determinative issue in the action because, by the terms of the contract, if plaintiff's employment by the Woodbury Institute had been terminated "for his fault," he would have forfeited not alone his right to be employed, but also his right to receive the

First Department, March, 1912.

[Vol. 149.]

deferred cash payments. The action resulted in a judgment for plaintiff not only for the items of damage specified in his complaint, but also for the sum of \$2,000 now sued for, which, although not embraced in the complaint, had become payable before the date of the trial. This judgment was modified by this court by striking out this sum of \$2,000, with interest, upon the ground "that the said item was not alleged in the complaint, and did not accrue until after the commencement of this action" (135 App. Div. 921). The plaintiff having consented to the modification, the judgment as modified was affirmed. An appeal to the Court of Appeals was dismissed on the ground "that the action was one for services, and, therefore, not appealable to the Court of Appeals" (198 N. Y. 551).

The defendant in the present action, besides setting up the foregoing judgment, reiterates the allegations made in the former action to the effect that plaintiff's discharge was "for his fault," and, therefore, justified.

The plaintiff pleads the former judgment as conclusive evidence that the discharge was without his fault, and, therefore, that his right to recover the cash installment now sued for remains unimpaired. Hence he argues that the only debatable question respecting his right to recover has been finally and conclusively established in his favor.

The defendants rely upon the former judgment as a bar to any further action by plaintiff for breach of the contract annexed to the complaint. Their position is that that contract was an entire indivisible one for services, and that for the breach of such a contract but one action for damages can be maintained. Hence they argue that plaintiff's former action for its breach necessarily covered all his damages, present and prospective, and is effective as a bar to any further action upon the same contract. Much stress is laid upon the ground given for dismissing the appeal to the Court of Appeals which, as has been said, was that *the action* was one for services. The Court of Appeals was not, however, called upon to construe and did not construe *the contract*, and did not hold that it was one exclusively for services. An examination of the contract shows that it was far from being one exclusively for services. The

App. Div.]

First Department, March, 1912.

plaintiff agreed to do (and has done) various things and for so doing defendants agreed to make him certain cash payments, and in addition to procure him employment by and continue him in the employment of a third party, the Woodbury Institute. The defendants thus became practically guarantors that plaintiff would be retained in the employ of the Woodbury Institute for five years, and the breach of contract for which plaintiff sued in the former action was that defendants had failed to secure his continuance in that employment. His *action* upon that breach, although in form one for damages for breach of contract, was in essence an action for services. The *contract*, however, embraced much more than services to the Woodbury Institute on the one hand and employment by that institute on the other. There were things to be done by plaintiff not embraced in the term "services," and considerations to be paid by defendants besides the undertaking to obtain and continue employment. The cash payment now sued for was quite an independent consideration from the undertaking to continue plaintiff in the employment of the Woodbury Institute, and since it was not due when the former action was commenced, could not be included in it. We are, therefore, of the opinion that the judgment in the former action is not a bar to the prosecution of this action, but that, on the contrary, it is a conclusive adjudication that plaintiff's discharge by the Woodbury Institute was without his fault. As the only events which, under the contract, could destroy his right to receive the cash installment now sued upon were either his death, or his discharge for his fault, it follows that he is entitled to recover and judgment in his favor was properly ordered on the pleadings. The questions of practice discussed upon the briefs do not affect the merits and need not be considered.

The judgment and order appealed from should be affirmed, with costs.

CLARKE, McLAUGHLIN, MILLER and DOWLING, JJ., concurred.

Judgment and order affirmed, with costs.

LUYTIES BROTHERS, Appellant, *v.* E. ZIMMERMANN AND COMPANY, Respondent.

First Department, March 8, 1912.

Trade mark — injunction — copy of trade mark calculated to deceive public — practice — injunction pendente lite.

Suit to enjoin the defendant from using a label alleged to be in fraudulent imitation of a label long used by the plaintiff. Evidence examined, and held, that the defendant's label, though not an actual copy of the plaintiff's label, so closely resembled it that equity would enjoin its use. To warrant such injunction it is not necessary that the defendant's label be an actual copy of that of the plaintiff. It is sufficient if the resemblance be such as to deceive the ordinary purchaser.

Where the imitation is apparent, use by the defendant will be enjoined *pendente lite*.

But where the use of a bottle by the defendant is not obviously unlawful, if used apart from the label, the use will not be enjoined *pendente lite*, but the issue left to be determined upon trial.

APPEAL by the plaintiff, Luyties Brothers, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of January, 1912, denying the plaintiff's motion for an injunction *pendente lite*.

George W. Tucker, Jr., for the appellant.

Abraham Benedict, for the respondent.

SCOTT, J.:

The label adopted by the defendant presents a typical case of fraudulent imitation of the label long used by plaintiff, and is none the less fraudulent and objectionable because its separate features, when examined in detail, are not found to be copies of the corresponding features in plaintiff's labels. The designer of the defendant's label certainly displayed great ingenuity in producing a label which would closely resemble, without actually copying plaintiff's label, but to justify the interposition of equity it is not necessary that a label should be copied. It is sufficient that the resemblance is such that it is calculated to deceive the ordinary purchaser under the conditions generally prevailing in the particular traffic to which the controversy

App. Div.] First Department, March, 1912.

results. (*T. A. Vulcan v. Myers*, 139 N. Y. 364; *Fischer v. Blank*, 138 id. 244; *Anargyros v. Egyptian Cigarette Co.*, 54 App. Div. 345; *Dutton & Co. v. Cupples*, 117 id. 172.)

There is so little doubt about the defendant's label that its use should be enjoined at once, without awaiting the result of a trial. The other features of defendant's bottle of which complaint is made are not so obviously unlawful as is the label, and the question of enjoining the use of them or any of them may well be left to be determined upon the trial. If the use of the label be discontinued, the other features standing alone may not be found to be objectionable. The order appealed from must be reversed, with ten dollars costs and disbursements, and the motion for an injunction *pendente lite* granted to the extent above indicated.

CLARKE, McLAUGHLIN, LAUGHLIN and DOWLING, JJ., concurred.

Order reversed with ten dollars costs and disbursements, and motion granted to the extent stated in opinion. Order to be settled on notice.

ALMA C. JOHNSON, as Administratrix, etc., of WILLIAM S. JOHNSON, Deceased, Respondent, v. RITER-CONLEY MANUFACTURING COMPANY, Appellant.

First Department, March 8, 1912.

Trial — information communicated to juror out of court — misdemeanor vitiates verdict.

A juror who, while going to his home during an adjournment of a trial, receives information from certain witnesses in the case that there had been two previous trials of the same case, one of which resulted in a large verdict for the plaintiff and the second in a disagreement, is guilty of a misdemeanor under section 373 of the Penal Law, and a judgment entered on a verdict in which he participated will be reversed even though the other jurors were not influenced by him.

APPEAL by the defendant, the Riter-Conley Manufacturing Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk

of the county of New York on the 8th day of January, 1912, denying the defendant's motion to set aside the verdict of a jury and vacate a judgment in favor of the plaintiff entered in said clerk's office on the 9th day of October, 1911, upon the verdict of a jury for \$15,000.

Scott McLanahan, for the appellant.

Charles P. Robinson, for the respondent.

DOWLING, J.:

Plaintiff has recovered a judgment for \$15,000 damages for the death of intestate caused by the alleged negligence of defendant. After the trial certain facts as to the conduct of one of the jurors thereat were brought to the attention of defendant's attorneys, who thereupon moved to vacate the judgment, to set aside the verdict and for a new trial. Upon that motion, numerous affidavits were submitted tending to show that juror No. 5, John Winton, Jr., had at the close of the first day of the trial expressed his determination to have brought in a large verdict for plaintiff and to control another member of the jury to join with him in such effort. These charges are denied by Winton. Conflicting statements were sworn to by the various affiants, Burt Rice having sworn to one affidavit used on defendant's behalf and to two affidavits used on plaintiff's behalf. Without determining how far these charges are justified, we find sufficient in Winton's own admissions to necessitate the granting of the motion. Clarence Pentz made affidavit that at the close of the first day of the trial (which occupied three days in all) as he and one Burt Rice, both witnesses upon the trial, were on their way home, the juror Winton came up to them, inquired if they were on the Johnson case and after certain statements said, "Where are you going?" They replied that they were going to drink, whereupon Winton said, "Come on," and all three went to a saloon, where he paid for liquor for all three, gave them his card and made certain other statements. In this Pentz was corroborated by Burt Rice. Winton in his first replying affidavit admitted that he met Pentz and Rice on his way to the saloon in question, for which they were also bound, and that they drank together, but denied he paid for

App. Div.] First Department, March, 1912.

all. He then swears that Pentz then told him that there had been two previous trials of the case; that the first trial resulted in a verdict of \$1,500 for the plaintiff, and the second in a disagreement of the jury. This admission he never thereafter qualified in any way. Of course, the fact that he received this information was never communicated to the trial court. In so receiving it, Winton was guilty of a violation of section 373 of the Penal Law (formerly section 73 of the Penal Code) providing as follows: "A juror * * * who * * * wilfully receives any communication * * * or information relating to a cause or matter pending before him, except according to the regular course of proceeding upon the trial or hearing of that cause or matter, is guilty of a misdemeanor." While the other jurors all make affidavit that the verdict was reached after full deliberation, and without any influence exerted upon them by Winton, the fact remains that their action was participated in by a juror who, even if not as prejudiced and biased against defendant as some of the affidavits would make him appear, still had, in violation of law, received information about the results of prior trials of the action which he was not entitled to receive and the fact of his having received which, if made known to the court, would have required his dismissal from further service upon the jury. As was said by Justice DANIELS in *Sparks v. Wakeley* (7 Wkly. Dig. 80): "The affidavit leaves little reason for doubting the truth of the charge that one or more of the jurors before whom this action was tried, improperly conversed with other persons concerning the case. Nothing improper was probably designed by the jurors, but the fact still remains that the jurors may have been, and probably were, influenced in their verdict by what was improperly said to them before or during the progress of the trial. Presumption cannot be closely balanced in cases of this description. The purity of the administration of justice requires that it should be guarded against extraneous influences of this description; and that can only be done by setting aside the verdict of jurors who have so far forgotten or disregarded the obligations of their office as to engage in con-

First Department, March, 1912.

[Vol. 149.]

versation with others concerning legal controversies they are called upon to hear and decide."

Upon the trial of an action litigants are entitled to the verdict of a jury of twelve impartial men, who have not been guilty during the trial of acts of impropriety so gross as to bring them within the inhibition of the penal statutes of the State, or of acts even if technical and trivial, which have affected the result of the trial. "We cannot determine with certainty, nor is it necessary that we should, that the acts complained of did influence the verdict. It is sufficient cause for reversal if they are likely to do so." (*Matter of Vanderbilt*, 127 App. Div. 408.) In the case at bar, even if the other jurors were uninfluenced by Winton, and even if he were not so prejudiced and biased as he is claimed to have been, the salient fact remains that he was guilty of a penal offense in receiving, outside the court room, information concerning the prior trials of the cause, and this misconduct was too serious to permit of a verdict in which he participated to remain effective.

The order appealed from will, therefore, be reversed, with ten dollars costs, and the motion to vacate the judgment, to set aside the verdict and for a new trial will be granted, with ten dollars costs.

CLARKE, McLAUGHLIN, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

WARREN J. FLICK, Appellant, *v.* WYOMING VALLEY TRUST COMPANY, Respondent.

First Department, March 8, 1912.

Attachment — effect of judgment for defendant — effect of stay — when additional security cannot be required.

Where a final judgment is rendered in favor of a defendant, a warrant of attachment issued against it in the action is wholly annulled, unless there be a stay of proceedings suspending the annulment, or the warrant is revived by the reversal or vacating of the judgment.

App. Div.]First Department, March, 1912.

Hence, after final judgment for the defendant, the court has no power to require the plaintiff to give further security for damages which may be sustained by reason of the attachment, where the annulment thereof has not been suspended as aforesaid.

APPEAL by the plaintiff, Warren J. Flick, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of January, 1912, granting the defendant's motion for an additional undertaking on attachment.

Frank Walling, for the appellant.

Carl A. Mead, for the respondent.

DOWLING, J.:

This action is brought to recover the sum of \$3,913.74 damages for an alleged conversion of stock. On April 27, 1908, a warrant of attachment was duly issued based on an affidavit showing among other things that defendant was a foreign corporation, organized under the laws of the State of Pennsylvania. Upon the granting of the warrant plaintiff furnished security in the sum of \$250, which was afterwards increased to \$500. The action then proceeded to trial and, on October 27, 1911, a verdict having been rendered for the defendant by direction of the court judgment was duly entered thereupon. Thereafter, on December 11, 1911, plaintiff appealed from said judgment to this court, but gave no security upon such appeal, whereupon defendant on December twentieth moved for an order directing plaintiff to file an additional undertaking in the sum of \$2,500. An order was made on January 9, 1912, granting the motion to the extent of requiring plaintiff within ten days to file an additional undertaking to the effect that if the judgment herein should not be reversed, the plaintiff would pay all costs which had been or might be awarded to the defendant and all damages which it has sustained or might sustain by reason of the said attachment, not exceeding \$1,500, and further providing that in case plaintiff should fail to file such additional undertaking all proceedings of the plaintiff and upon his appeal were stayed. From such order this appeal is taken.

When the order in question was made final judgment had

First Department, March, 1912.

[Vol. 149.]

been entered in favor of the defendant. The warrant of attachment was, therefore, annulled. (Code Civ. Proc. § 3343, subd. 12.) That is, upon the entry of such judgment in favor of defendant the warrant became entirely vacated and of no force for any purpose. (*Henry v. Salisbury*, 33 App. Div. 293; *Friede v. Weissenthanner*, 27 Misc. Rep. 518; *McKean v. National Life Association*, 24 id. 511.) There is but one method by which the entire annulment of the warrant can be avoided after judgment in favor of the defendant, and that is by the means indicated in the section above referred to, which provides as follows, so far as is material to this appeal: "A warrant of attachment against property is said to be 'annulled' when * * * a final judgment is rendered therein in favor of the defendant. But, in the case last specified, a stay of proceedings suspends the effect of the annulment, and the reversal or vacating of the judgment revives the warrant." In this case no stay of proceedings has ever been obtained, and the warrant was, therefore, finally annulled. (See cases cited *supra*.) The warrant being no longer in force the court was without power to require plaintiff to give further security thereupon.

The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements, and the motion in all respects denied, with ten dollars costs.

CLARKE, McLAUGHLIN, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

KATHERINE REILLY, Respondent, *v.* CHARLES BURKELMAN, as Executor, etc., of PATRICK J. RYDER, Deceased, Appellant.

First Department, March 8, 1912.

Decedent's estate — claim for services rendered testator during his lifetime — proof not establishing contract — clearest proof required — erroneous charge — presumption — payment of wages to claimant.

Action against an executor to recover for alleged services rendered to the testator during his lifetime and to members of his family at his request, the plaintiff claiming an express contract, and also an express

App. Div.] First Department, March, 1912.

promise to leave her by will an amount sufficient to compensate her. Evidence examined, and *held*, that the plaintiff wholly failed to establish her claim.

The rule that such claim against an estate must be established by the clearest and most convincing evidence, given and corroborated in essential particulars by disinterested witnesses, obtains in an action at law, as well as in an action for the specific performance of a contract.

In such action against an estate it is error for the court to rule that the Statute of Limitations is not a bar to any part of the claim back of six years where there is no evidence whatever establishing plaintiff's claim of an express promise to leave property by will to compensate her.

Where it appears that such claimant against an estate received regular wages the presumption is that the payments were in full for all services rendered.

Evidence examined, and *held*, that a finding by the jury that regular payments for services were not made was against the weight of evidence.

APPEAL by the defendant, Charles Burkelman, as executor, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 18th day of May, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of May, 1911, denying the defendant's motion for a new trial made upon the minutes.

John J. Halpin, for the appellant.

Howard A. Sperry, for the respondent.

MILLER, J.:

The plaintiff brought this suit to recover the sum of \$15,950 for services rendered the defendant's testator. She alleged in her complaint that at his request and upon his promise to pay therefor she rendered services for him as housekeeper between November, 1890, and December 1906, of the value of \$5,760; that, upon like request and promise to pay, she rendered services from November, 1890, to July, 1905, as nurse for his sister, a member of his household, of the value of \$900; that, upon like request and promise to pay, during the year 1900 she rendered services as nurse to his mother, a member of his household, of the value of \$130; that, upon like request and promise to pay, between November, 1890, and December, 1906, she rendered services as nurse to him of the value of \$8,320:

First Department, March, 1912.

[Vol. 149.]

that, between the 1st day of January, 1897, and the 30th day of May, 1905, upon like request and promise to pay, she rendered services as nurse to his brother, a member of his household, of the value of \$840. She also alleged a promise on his part to leave her by will a legacy sufficiently large to compensate her for the said services, and a breach of that agreement. Upon the trial it appeared that the plaintiff was the testator's cousin; that she came to this country from Ireland in 1881 or 1882 and became a member of his household and remained such until about six months before his death, which occurred in June, 1907. She admitted that, when she left, she had \$800 or \$900 in a savings bank and that she had drawn out of the bank \$200 at one time to take a trip to Ireland. There is no evidence whatever to support a finding of an express contract except for the testimony of two witnesses, one of whom testified that on one occasion the testator said, referring to the plaintiff, "Yes, I am going to take care of Kate;" and the other, that on another occasion the testator said, "Yes, Kate is a good nurse, but I will see her all right for it. I will see her all right." A witness for the defendant, who had been employed as a servant in the said household for thirteen or fourteen years, testified that she was paid monthly and that she saw money paid to the plaintiff pretty nearly every time that money was paid to her.

The plaintiff's counsel evidently thought it necessary to plead and prove an express contract. It seems too plain for discussion that there is an utter failure of proof on that head. The evidence hereinbefore quoted tends to establish at the most nothing but an intention on the part of the testator and would be wholly insufficient, even if the rule did not apply that the case had to be proven by the clearest and most convincing evidence, given or corroborated in all essential particulars by disinterested witnesses. (*Roberge v. Bonner*, 185 N. Y. 265; *Rousseau v. Rouss*, 180 id. 116.) It is to be observed that both of those cases were actions at law and hence refute the assertion of the respondent that the said rule only applies in actions for the specific performance of contracts. The plaintiff has undertaken to recover for the breach of a special contract to leave property by will, and upon that theory obtained a ruling of the trial court that the Statute of Limitations was not a bar

App. Div.] First Department, March, 1912.

to any part of the claim back of six years. As there was no evidence whatever of such a contract, it is plain that that ruling alone requires a reversal of the judgment

The plaintiff denied that she received regular wages, although, according to her own admission, she managed to save about \$1,100 during the period for which she is now asserting a claim. Of course, if she received regular wages, the presumption would be, as the court charged at the defendant's request, that such regular payments were in full for all services rendered. (See *Heywood v. Doherty*, 121 N. Y. Supp. 610.) We think the finding of the jury that regular payments were not made is against the weight of evidence. There is not only the direct testimony to that effect, supported by the admitted fact of the savings made by the plaintiff during the period, but there is the further strong circumstance that the plaintiff left the testator's household at least six months before his death, without, so far as appears, asserting any such claim as is now made.

The nature of the plaintiff's claim suggests an attempt to recover for extra service not covered by the regular compensation received. Her suit is for the breach of a contract to leave her property by will sufficient to compensate her for her services, and upon her own theory, as well as upon the defendant's evidence establishing the regular payment of wages, it was necessary for her to prove such a special contract. That conclusion makes it unnecessary to consider the other questions, which may not arise on a new trial.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide event

INGRAHAM, P. J., MC LAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

MARY McFARLAND, Respondent, *v.* JOHN T. SHARKEY, Sole Executor Named in the Will of DANIEL SHEEHAN, Deceased, and Others, Appellants, Impleaded with FRANCIS X. SHEEHAN, Heir at Law and Next of Kin, and Others, Defendants.

First Department, March 8, 1912.

Will — action to annul probate — evidence not showing undue influence — trial — failure to submit specific questions — failure to object.

Action under section 2653a of the Code of Civil Procedure to annul the probate of a will wherein the executor, leaving no wife or descendants, gave the bulk of his property to charities. Evidence examined, and held, insufficient to warrant an order setting aside a verdict for the defendant upon the ground that the will had been procured by undue influence.

Where the court directed the jury to find either (1) that the writing was the will of the testator, or (2) that the writing was not his will, the plaintiff cannot object that a finding that the writing was the testator's will is neither a general nor special verdict, where no request for special findings on specific questions of facts was made at trial.

APPEAL by the defendants, John T. Sharkey, as executor, etc., and others, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 10th day of August, 1909, setting aside the verdict of a jury in favor of certain of the defendants and granting a new trial in an action to determine the validity of the probate of a will under section 2653a of the Code of Civil Procedure.

William L. Tierney, for the appellants.

A. P. Bachman, for the respondent.

MILLER, J.:

Daniel Sheehan died in St. Vincent's Hospital on the 20th of March, 1907, at the age of seventy-seven years. Five days before his death he made what is claimed to be his last will and testament. He was a bachelor and had accumulated an estate of about \$60,000. His next of kin were five nephews and nieces. To two nieces he gave the sum of \$10,000 each, one niece he gave \$500, and to one nephew he gave \$250. The

App. Div.]First Department, March, 1912.

other nephew he did not mention. He gave \$500 to the Sister of Charity who nursed him, \$500 to the Rev. Thomas J. Doyle, to be used for masses for himself and his deceased relatives, and \$5,000 each to the superior of the Little Sisters of the Poor in New York city, the superior of the House of the Good Shepherd in New York city, the superior of the House of the Holy Family in New York city, the president or other chief executive of the Mission of the Immaculate Virgin in Lafayette street, New York city, the superior of St. Joseph's Hospital in the borough of the Bronx, the superior of the Foundling Hospital in East Sixty-eighth street in New York city, the mother superior of the Dominican Convent of Our Lady of the Rosary in New York city, and the superior of Seton Hospital for Consumptives at Spuyten Duyvil; and he made the Society of St. Vincent De Paul in New York city his residuary legatee. The will was admitted to probate by Surrogate THOMAS, and thereafter this action was brought by the niece to whom the legacy of \$500 was given. She alleged in her complaint that the alleged will was not executed in conformity with the requirements of law, that the deceased did not possess testamentary capacity, and that the alleged will was procured by the fraud and undue influence of the defendants Sharkey and Gilliece. The attorney who tried the case for the plaintiff also represented the nephew, Francis X. Sheehan, who was not mentioned in the will and who had for many years been living in Ireland. There is in the record an unverified answer of said Francis X. Sheehan, which contains an averment that the will was procured by the undue influence of James F. O'Beirne. So far as I am able to discover, it does not appear when or upon whom that was served, and it is not pretended that it was served upon any of the defendants who are seeking to sustain the will or that they had ever heard of it until the close of the evidence, when the court, at their request, charged that "there is no issue in this case as to any undue influence upon the part of James F. O'Beirne, because if such issue is tendered by the answer of Francis Sheehan, it was never served upon these defendants, and there is no such issue on these pleadings." The jury found for the proponents of the will, whereupon the court set aside the verdict for error in charging said request on

First Department, March, 1912.

[Vol. 149.]

the ground that, even if such issue was not tendered by the pleadings, it had been litigated by the parties.

We are unable to discover anything in the course of the trial to suggest that the alleged undue influence of said O'Beirne was an issue in the case, until it came to the charge of the court. He was called as a witness by the plaintiff to testify to the instructions given him by the testator and the circumstances surrounding the execution of the will. But there was nothing in that circumstance to suggest that the plaintiff was asserting that he had exercised undue influence upon the testator. It is said that it was sufficient to serve the answer of Francis X. Sheehan upon the plaintiff with whom he made common cause. It does not even appear in this record that that answer was served on the plaintiff. It was produced at the trial by the attorney of record of Francis X. Sheehan, who was the plaintiff's trial counsel. Assuming that the exercise of undue influence by O'Beirne was an issue in the case, we think that the order setting aside the verdict was improper for the reason that there was absolutely no evidence whatever to support that charge. O'Beirne was a stranger to the testator. He had no personal interest whatever to serve. The testator, who was evidently a Roman Catholic, requested the defendant Sharkey to procure a lawyer who was also a Roman Catholic. Sharkey had known the testator for some years, and had made an arrangement with him to bury him and erect a headstone at his grave. Upon Sharkey's request O'Beirne called upon the testator at the hospital, received the instructions for his will, and two days later called again, when it was executed. He was called as a witness for the plaintiff, and frankly disclosed all that occurred on both occasions. Apart from his testimony there is nothing in the case upon which to base a charge of undue influence exercised by him, and, according to that testimony, the testator gave intelligent reasons, the truth of which no one disputes, for treating his nephews and nieces as he did. He desired to divide the bulk of his property among Catholic charities, and he requested O'Beirne to obtain information and to give him advice on that head. But compliance with that request did not constitute the exercise of undue influence. Having received that information

App. Div.]

First Department, March, 1912.

and advice the testator exercised his own judgment, and made a will which was his own free, voluntary and intelligent act. There is not a particle of evidence that O'Beirne had any motive to, or in fact did, exercise undue influence over the testator. Giving requested advice is not the exercise of undue influence.

While the will was made but a few days before the death of the testator, the evidence plainly shows that he was in possession of his mental faculties, and even if there was evidence to go to the jury on the question of testamentary capacity or of undue influence exerted by others than O'Beirne, a finding of the jury in favor of the contestants on either of these issues would be so clearly against the weight of evidence that we should not hesitate to set it aside. A verdict, therefore, in favor of the will should not be disturbed except for some substantial reason.

The jury were directed to find either (1) "that the writing produced is the last will of Daniel Sheehan," or (2) "that the writing produced is not the last will of Daniel Sheehan." Their verdict was announced thus: "We, the jury, find that the writing produced is the last will of Daniel Sheehan;" and, while that verdict conformed to the issue to be tried, it is claimed that it is illegal for being neither a general nor a special verdict. It is sufficient to say on that head that if the plaintiff desired special findings on specific questions of fact an appropriate request should have been made.

What we have already said disposes of the alleged errors in the admission of evidence bearing upon the issue as to testamentary capacity. The plaintiff was given the widest latitude throughout the trial; she has had one chance before the surrogate, another in the Supreme Court before a jury, and we think it is time the contest ended.

The order appealed from should be reversed and the verdict of the jury reinstated.

CLARKE, McLAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Order reversed and verdict of jury reinstated. Order to be settled on notice.

HUDSON IRON COMPANY, Appellant, *v.* STEPHEN L. MERSHON and FREDERICK CRANE, Respondents.

First Department, March 8, 1912.

Bills and notes — replevin to recover possession of notes — fraud and deceit — contributory negligence as defense.

In a suit for replevin to recover possession of three notes made by the plaintiff to the order of its president and by him indorsed and delivered to the defendant M., the plaintiff's evidence tended to show that the notes were delivered to M. to be by him transferred to a third party, while the defendant's evidence tended to show that the notes were given to M. for services. M. indorsed and delivered two of the notes to defendant C., who claims to be a holder in due course for value. Plaintiff testified that M. obtained possession of the notes by fraud and deceit.

Held, that under the evidence a judgment awarding C. possession of the two notes should be affirmed but the judgment giving defendant M. possession of the third note should be reversed.

Contributory negligence is not a defense to an action for fraud and deceit. A person who is negligent in reposing confidence in a wrongdoer is not thereby prevented from recovering his property from the latter.

APPEAL by the plaintiff, the Hudson Iron Company, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 13th day of May, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of May, 1911, denying the plaintiff's motion for a new trial made upon the minutes.

William M. Wherry, Jr., for the appellant.

Benjamin F. Spellman, for the respondents.

MILLER, J.:

This is a replevin suit to recover possession of three notes, each for the sum of \$1,666.66, made by the plaintiff to the order of Harold G. Villard, its president, and by him indorsed and delivered to the defendant Mershon. The plaintiff's evidence tends to show that the notes were delivered to said defendant to be by him delivered to a third party. The defend-

App. Div.]

First Department, March, 1912.

ants' evidence tends to show that the notes were given to the defendant Mershon for services. Mershon indorsed and delivered two of the notes to the defendant Crane and retained the third one. The defendant Crane claims to be a holder in due course for value.

The court charged at the request of the defendants that, if Villard, the plaintiff's president, in delivering the notes to the defendant Mershon did not act "as an ordinary prudent and careful man would under the same circumstances," the jury must find for the defendants. The jury found a verdict for both defendants. Upon the plaintiff's evidence Mershon obtained possession of the notes by fraud and deceit. But under the charge of the court the jury were permitted to find that, if Villard, the plaintiff's president, was negligent in trusting Mershon, the latter acquired good title to the notes even as between himself and the plaintiff. The bare statement of the proposition refutes it. It is not the law of this State that contributory negligence is a defense to an action for fraud and deceit or that a person who is negligent in reposing confidence in a wrongdoer may not recover his property from the latter. (See *Wilcox v. American Telephone & Telegraph Co.*, 176 N. Y. 115.)

It is impossible to say upon what theory the jury rendered their verdict, and, although there were other requests charged by the court which were somewhat inconsistent with the one in question, it is impossible to say that the jury were not misled. Indeed, it is quite probable that they were misled because considerable emphasis appears to have been put upon the assertion that Villard, upon the plaintiff's theory of the case, was negligent in delivering the notes to Mershon.

The defendant Crane testified that he discounted the notes at Mershon's request in reliance upon the latter's statement that they had been given him for services and without any knowledge whatever that they were being diverted from the purpose for which they were given, and that he paid to Mershon the face of the notes, less interest. In support of that testimony his check for the amount of the two notes less interest was produced, and it was established that Mershon procured the check to be certified and obtained the money on it. We are

unable to discover a single circumstance tending to discredit that testimony. It is neither improbable nor inconsistent with any other evidence in the case, and we think it would be unfair to the defendant Crane to grant a new trial for an error which was prejudicial only because the issue between the plaintiff and the defendant Mershon was sharply contested. As a matter of fact, the plaintiff has united two causes of action against different parties, though the action appears to have been brought on the theory that all three notes were transferred to, and held by, the defendant Crane. We can now effect a severance and do justice at the same time by affirming the judgment as to the defendant Crane, and by reversing as to the defendant Mershon and granting a new trial.

The judgment in so far as it adjudges that the defendant Crane is entitled to the possession of two notes in suit affirmed, with costs, and the judgment in so far as it adjudges that the defendant Mershon is entitled to the possession of one note for \$1,666.66 reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and DOWLING, JJ., concurred.

Judgment as to defendant Crane affirmed, with costs, and as to defendant Mershon reversed and new trial ordered, costs to appellant to abide event. Order to be settled on notice.

EMILY H. C. JACOCKS, Appellant, *v.* LEWIS J. MORRISON,
Respondent.

First Department, March 8, 1912.

Contract — pleading — remedy for indefiniteness of complaint — forfeiture.

Defendant and plaintiff's assignor entered into a contract, whereby, in payment for certain stocks and bonds, the former agreed to pay to the latter a certain sum and to procure a conveyance of fifteen acres of land to be selected by the latter out of a larger tract owned by a third party,

App. Div.] First Department, March, 1912.

and whereby defendant agreed in default in procuring such conveyance to pay the plaintiff's assignor a certain sum in lieu thereof. The complaint of the assignee alleged that the defendant paid the sum mentioned in the contract but failed to cause the conveyance to be made or to pay the sum in lieu thereof, that plaintiff demanded of the defendant that he convey to her fifteen acres of said land, that defendant failed to comply with the demand, that thereafter her assignor caused fifteen acres to be selected and that notice of such selection was served upon the defendant. *Held*, that the complaint was not demurrable because it failed to state the time when said demands were made; that the fact that the complaint was indefinite in this respect is a defect to be cured by motion.

The plaintiff or her assignor did not necessarily incur a forfeiture by failing to make a selection within either a reasonable or a stated time.

DOWLING, J., dissented.

APPEAL by the plaintiff, Emily H. C. Jacocks, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of December, 1911, upon the decision of the court rendered after a trial at the New York Special Term sustaining the defendant's demurrer to the complaint.

Arthur Furber, for the appellant.

Herbert R. Limburg, for the respondent.

MILLER, J.:

The action is upon a contract entered into between the defendant and the plaintiff's assignor whereby in payment for certain stocks, bonds and choses in action transferred to him and in settlement of certain disputes, the former agreed to pay the latter the sum of \$3,000 in cash, and to procure a conveyance of fifteen acres of land, to be selected by the latter out of a larger tract owned by a third party, a corporation, and whereby the defendant agreed in default in procuring such conveyance to pay the plaintiff's assignor the sum of \$3,500 in lieu thereof. It is alleged that the defendant paid the sum of \$3,000, but has failed to cause said conveyance to be made or to pay the stipulated sum in lieu thereof.

In a former action between the same parties a demurrer to the complaint was sustained on the ground that the complaint did not allege the selection of any particular fifteen-acre plot.

First Department, March, 1912.

[Vol. 149.]

(*Jacocks v. Morrison*, 129 App. Div. 285.) The present complaint, after alleging the assignment of the contract to the plaintiff, avers that the plaintiff, being willing to accept any fifteen acres within the plot of land in question, demanded of the defendant that he perform his contract by conveying to her fifteen acres of said land; that the defendant failed to comply with the demand, and that thereafter her assignor caused fifteen acres to be selected and located, and that notice of a selection with a description thereof was served upon the defendant with a demand that he convey or cause the same to be conveyed to the plaintiff.

The objection to the present complaint is that it fails to state the time when said demands were made. No doubt, the complaint is indefinite in that respect. But that is a defect to be cured by motion, not by special demurrer, as was the practice when *Osborne v. Lawrence* (9 Wend. 135), relied upon by the learned court at Special Term, was decided.

If the plaintiff would have to prove a selection and demand within a stated or a reasonable time in order to recover, an allegation to that effect would doubtless be essential to a statement of her cause of action. But this is not the case of an executory contract of purchase and sale as was the case of *Pope v. Terre Haute Car & Manufacturing Co.* (107 N. Y. 61), also relied upon by the learned court at Special Term. The defendant received the consideration for which he agreed to procure a conveyance from a third party or to pay in lieu thereof the sum of \$3,500. A selection of the fifteen acres to be conveyed had to be made before the defendant could be put in default, but a failure to make the selection within a reasonable time or within a definite time, if one was stated in the contract, would not necessarily defeat the right of the plaintiff or her assignor to recover. No doubt, as the respondent contends, he could not be required to be forever in a position to procure a conveyance from a third party. But if there be any reason to excuse performance on his part, it is a matter of defense which we cannot pass upon without knowing the facts. The point which we now decide is that the plaintiff or her assignor did not necessarily incur a forfeiture by failing to make a selection within either a reasonable or a stated time.

App. Div.] First Department, March, 1912.

The interlocutory judgment should be reversed, with costs, and the demurrer overruled, with costs, with the usual leave to the defendant to answer on payment of said costs.

INGRAHAM, P. J., McLAUGHLIN and LAUGHLIN, JJ., concurred; DOWLING, J., dissented.

Judgment reversed, with costs, and demurrer overruled, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs.

MARY LEVY, Appellant, Respondent, *v.* ABRAHAM J. LEVY, Respondent, Appellant.

First Department, March 8, 1912.

Husband and wife—contract for support and maintenance—reduction of amount of alimony.

A husband and wife after separation may enter into a valid and binding contract for the separate support and maintenance of the wife.

On an application to reduce the amount of alimony made on the ground of a change in the financial condition of the parties since the entry of the decree the court may take into consideration a contract for separate support and maintenance previously entered into by the husband and wife.

A husband, who is under obligation to support a former wife pursuant to a contract therefor and a decree of divorce awarding alimony, cannot evade liability by incurring new obligations. Thus, where he remarries in another State, and makes his second wife a large monthly allowance, the amount of alimony awarded in the divorce action should not be reduced.

CROSS-APPEALS by the plaintiff, Mary Levy, and the defendant, Abraham J. Levy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of December, 1911, modifying a decree of divorce by reducing the allowance of alimony.

John H. McCrahan, for the plaintiff.

Max D. Steuer, for the defendant.

APP. DIV.—VOL. CXLIX. 36

MILLER, J.:

The application resulting in the order appealed from was made on the ground of a change in the financial condition of the parties since the entry of the decree. The matter was referred to a referee, who took testimony and reported in favor of a reduction of alimony to \$100 a month, but upon a motion to confirm the report, the court at Special Term reduced the allowance only to the sum of \$150 a month. If the only question in the case were that presented by the evidence relating to the changed financial condition of the parties we might not be disposed to interfere with the discretion of the Special Term.

After the action for divorce was brought the parties entered into a written agreement by which the defendant, in terms "for himself, heirs, executors, administrators and assigns," agreed to pay the plaintiff \$300 a month during the term of her natural life, and stipulated that in case of his prior death, such payments should continue during the term of her natural life, so long as she remained unmarried, and should be a charge upon his estate. He also expressly agreed that he would not "in any action or proceedings or in any manner apply for a modification of the terms of this agreement." The plaintiff on her part agreed not to apply in any action or proceedings for an increase of said sum, and she further agreed to execute to the defendant a release of her right of dower in and to real estate owned by him of the value of over \$100,000. She testified, and it was not denied, that she had executed said release. The agreement also contained this provision: "*Fifth.* The party of the second part further consents that in said action there may be inserted in the decree of divorce, in the event of such decree being granted the party of the first part, a provision allowing the party of the first part alimony at the rate of Three hundred (\$300.00) Dollars per month, the provision in said decree not to affect the terms of this agreement."

The learned referee was of the opinion that the agreement was void as against public policy, and that it was merely intended as a stipulation in the action and not as an independent agreement. The contract did not recite that the parties were then living separate and apart, but the evidence tends to

App. Div.] First Department, March, 1912.

indicate that they had theretofore separated, and, while the referee appears to have entertained some doubt as to the sufficiency of that evidence, we are unable to find that there was really any serious dispute about it. There can be no doubt that, after a separation, a husband and wife can enter into a valid and binding contract for the separate support and maintenance of the wife. (*Galusha v. Galusha*, 116 N. Y. 635.) The contract in this case was held to be invalid on the authority of *Lake v. Lake* (136 App. Div. 47). But in that case the benefit to be derived by the wife was contingent upon the dissolution of the marriage. In this case the promise to pay the wife \$300 a month was unconditional. The provision that, in the event of a decree of divorce, a provision should be inserted allowing the plaintiff alimony at the rate of \$300 a month did not modify the unconditional agreement to pay that sum in any event. Had there been no decree, the contract obligation to pay that sum would have continued; hence it follows not only that the agreement was not invalid for the reason assigned in the *Lake* case, but that it was more than a mere stipulation for use in the action.

Of course, the contract did not have the effect of depriving the court of jurisdiction. The question is whether the court in the exercise of its jurisdiction will ignore a valid contract, fixing the amount which the wife is to have for her support. It may be granted that the contract obligation cannot be enforced by contempt proceedings whereas the decree of the court may be. But the answer to that objection, so far as this application is concerned, is to be found in the fact that the defendant is concededly able to pay the amount agreed upon. While the court doubtless has jurisdiction to modify its decree and to leave the parties to the enforcement of their contract rights by action, we do not think the evidence in this case sufficient to justify such action. Within a few days after the final decree of divorce, the defendant, in disregard, if not in contempt of it, contracted a second marriage in another State, and he concedes that he makes his present wife a monthly allowance of \$500 for household expenses. He cannot evade the obligation imposed upon him by his contract and the decree of the court by incurring new ones.

First Department, March, 1912.

[Vol. 149.]

The order should be reversed, with ten dollars costs and disbursements to the plaintiff, and the motion denied, with ten dollars costs and disbursements on the motion to the plaintiff.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements to plaintiff, and motion denied, with ten dollars costs and disbursements on the motion to plaintiff. Order to be settled on notice.

MARSHALL L. WARRIN, Respondent, *v.* **CATHARINE HAVERTY**, as Administratrix, etc., of **JAMES T. HAVERTY**, Deceased, Appellant.

First Department, March 8, 1912.

Summary proceedings—jurisdiction of court.

It is essential to the jurisdiction of the court to entertain and make a final order in summary proceedings that the tenant should be in possession. Where the uncontested evidence shows that the tenant was not in possession at the time the proceeding was instituted, and was not holding over or claiming any rights as a tenant of the premises, the proceeding should be dismissed.

APPEAL by the defendant, Catharine Haverty, as administratrix, etc., from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 4th day of May, 1911, affirming a final order and judgment of the Municipal Court of the city of New York in a summary proceeding for the removal of a tenant.

John W. Browne, for the appellant.

Henry de Forest Baldwin [*Allen Evarts Foster* with him on the brief], for the respondent.

LAUGHLIN, J.:

The lease under which the proceedings to dispossess the tenant were instituted was made on the 1st day of March, 1906, between the plaintiff and one James T. Haverty, since deceased,

App. Div.]First Department, March, 1912.

and was for the use of the building known as 150 East Thirty-ninth street, with the appurtenances, for the term of three years from May 1, 1906, at an annual rental of \$2,500, payable in equal monthly installments in advance, on the first day of each month; and on the 16th day of September, 1907, by an indorsement on the lease duly made by the parties, the term was extended to May 1, 1912, at an annual rental of \$2,600, the other conditions remaining the same. The tenant died on the 28th day of January, 1909, and the defendant was duly appointed his administratrix on the 4th day of February, 1909. The occupation of the premises by the tenant was through a sub-tenant, Samuel Parker & Sons, who used them as a stable. It appears that a notice in writing that the building had been reported "as unsafe and dangerous" owing to the fact that "The rear wall is badly bulged and out of plumb, the brickwork of front is cracked and part of easterly wall at 2nd story broken and loose," was given by the superintendent of buildings for the borough of Manhattan to the owner on the 29th day of April, 1910, and to the sub-tenant on the 28th day of April, 1910, and they were required to make the building safe as specified in the notice which necessitated the removal of part of the walls, and they were also notified that upon their failure to immediately certify their assent or refusal "to secure or remove said building" a survey would be ordered as required by law, and the expense thereof would become a lien on the premises. The defendant testified that she also received a like notice from the bureau of buildings and that she mailed it to the plaintiff's agents. On the 5th day of May, 1910, the agents of the owner reported to him that the attorney for the tenant had notified them that his client had abandoned the premises in consequence of their dangerous condition, as shown by the orders from the different municipal departments, copies of which were inclosed—it does not otherwise appear what they were—and that they had insisted that the lease required the tenant to comply with such orders. On the next day the landlord made a demand on the tenant in writing that she comply with said orders, and gave her notice that he denied her right to surrender the property and declined to accept any surrender thereof. The sub-tenant

First Department, March, 1912.

[Vol. 149.]

had removed from the premises on the 1st day of May, 1910; but the cause of removal is not otherwise shown. It appears that there were keys to the building and that they came into the possession of the plaintiff's agents who it is conceded had them in the month of June, 1910, but the evidence does not show definitely from whom or when they were received. It appears that the premises remained vacant after the sub-tenant removed, and that a fence was erected about the entrance or office door and the doors barred, but the exact time when this was done or by whom was not shown. Neither the owner, nor the sub-tenant nor the tenant accepted the notice of the superintendent of buildings, or agreed to do the work as required by the notice, and said superintendent gave a further notice in accordance with law that a survey would be made on the 13th day of May, 1910, and that the report of the survey would be presented to the court on the fourteenth day of May for a hearing with respect to the facts. It was found by the survey that the building was unsafe and dangerous and a notice to that effect was posted thereon, and it was adjudged by the court on the 14th day of May, 1910, that the building was unsafe and dangerous, and that the rear wall was bulged, out of plumb and liable to collapse, and that portions of the brickwork of the front and east walls and chimneys were cracked and defective, and it was ordered that a precept be issued to the superintendent of buildings requiring him, forthwith, to make the building safe by removing all of the rear wall and all defective parts of the front and east walls and chimneys, and by rebuilding the same and by shoring and bracing. The work thus required was performed by a contractor employed by the owner, and the evidence shows that the keys were delivered to the workmen, and that the work cost upwards of \$1,400. Early in May the agents demanded rent of the tenant for that month, but she declined to pay it. The matter was then placed in the hands of the attorneys for the plaintiff who early in the fall brought an action to recover the rent down to October first. There appears to have been no further demand of the tenant for payment of rent, or claim made that she was still in possession until on or about the twenty-sixth day of November thereafter, when she received a

App. Div.] First Department, March, 1912.

notice from the plaintiff claiming that she was indebted to him for rent from May first to November thirtieth, and requiring payment of the same or surrender of the premises within three days. She answered this in writing on November thirtieth, denying that she was indebted to the plaintiff and stating that with the exception of a summons and complaint served on her the 24th day of September, 1910, the action to recover rent, this was the first time any claim or demand had been made on her for rent of the premises, which, she asserted, had been in the possession of the plaintiff since May when she surrendered them, and she also asserted that she had surrendered the premises on account of the fact that they had become dangerous and unsafe, and that the surrender had been accepted. On or about the 1st day of December, 1910, a personal demand was made on the defendant for the payment of the rent from May first to December first, and this proceeding was then instituted. In the petition the landlord alleged that the tenant held over and continued in possession of the premises. The tenant by answer denied that she was in possession, and alleged that she surrendered the possession, as already stated, on or about the 1st day of May, 1910, and that the landlord had accepted the surrender, and further pleaded that the court was without jurisdiction.

We are of opinion that the court was without jurisdiction to make the order, for the uncontroverted evidence shows that the tenant was not in possession at the time the proceeding was instituted, and was not holding over or claiming any rights as a tenant of the premises. It is essential to the jurisdiction of the court to entertain a summary proceeding and to make a final order therein that the tenant should be in possession. (Code Civ. Proc. § 2231; *Brown v. Mayor*, 66 N. Y. 385; *Ash v. Purnell*, 32 N. Y. St. Repr. 306; *Gallagher v. Reilly*, 31 id. 556; *Boehm v. Rich*, 13 Daly, 62.) The adjudication would be conclusive against the tenant that she held over and remained in possession in the action by the landlord for the rent (*Prince v. Schlesinger*, 116 App. Div. 502; *Grafton v. Brigham*, 70 Hun, 134), and that appears to be the only object of the proceeding. A marshal or other officer of the court could give plaintiff nothing under the final order for the premises were wholly

First Department, March, 1912.

[Vol. 149.]

vacant and plaintiff had the keys. It is not necessary to decide whether the tenant was justified in removing from the premises on the theory that there was a constructive eviction, or whether the landlord accepted the surrender, for since it clearly appears that the tenant was not in possession the summary proceedings cannot be sustained.

It follows that the determination of the Appellate Term should be reversed, with costs to the appellant, and the final order should be reversed and the proceeding dismissed, with costs to appellant.

INGRAHAM, P. J., McLAUGHLIN, MILLER and DOWLING, JJ., concurred.

Determination reversed, with costs, and final order reversed and proceeding dismissed, with costs to appellant.

WILLIAM J. SWEENEY, Respondent, *v.* DOUGLAS COPPER COMPANY, Appellant.

First Department, March 15, 1912.

Principal and agent — action against undisclosed principal — rescission of contract — evidence of agency — election of remedies — estoppel.

One E., upon the faith of an advertisement signed by K. in a financial bulletin offering bonds for sale under certain conditions, sent to K. a certain sum in full payment for one bond. K. then wrote to E. and suggested that he change his order and purchase another class of bonds. E. accepted the suggestion and sent a draft for the difference in price, but never received the bond for which he subscribed. K. subsequently became a bankrupt and E. filed a claim which was allowed but never paid, there being no assets. Long after the filing of this claim E. was advised that he had a cause of action against the Douglas Copper Company, and thereupon executed an assignment to R., who subsequently assigned the claim to S., the plaintiff, who brought an action against the Douglas Copper Company as an undisclosed principal of K. to recover the amount paid for the bond, alleging a rescission of the contract between R. and the Douglas Copper Company.

Held, that under the evidence K. was the agent of the defendant; That the allowance of the claim in bankruptcy against the agent was not such an election as estopped pursuit of the principal, the defendant com-

App. Div.]First Department, March, 1912.

pany, as at the time of the filing of the claim in bankruptcy E. had no knowledge of the relation between K. and the defendant. An election of remedies in order to create an estoppel must be predicated upon full knowledge of the facts.

APPEAL by the defendant, the Douglas Copper Company, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 19th day of May, 1911, affirming a judgment of the City Court of the city of New York, and an order denying a motion for a new trial; and also from said judgment and order of the City Court.

Martin L. Stover of counsel [*Eaton, Lewis & Rowe*, attorneys], for the appellant.

Archibald Douglas of counsel [*Paul Armitage* with him on the brief], *Douglas & Armitage*, attorneys, for the respondent.

CLARKE, J.:

One M. L. Eldridge, sixty-five years of age, a resident of Davenport, Ia., saw a copy of King's *Financial Bulletin*, published at Boston, and bearing date November 23, 1907, in which appeared a broadside entitled "Douglas Copper Company bonds may be secured at 110 for one week longer, but price will increase December 1."

The article was signed by C. F. King. It stated, *inter alia*, "this is the first allotment of \$100,000 of these bonds, and the company in giving me the exclusive right to offer them to the public is recognizing the fact that my office reaches more solid investors of America than any other financial house in the country. * * * These bonds are issued in three denominations, \$100, \$500 and \$1,000, and bear interest semi-annually. * * * Holders of them will enjoy a fixed income of 6 per cent as long as they hold them, and in the year 1909 will also have the privilege of converting them into stock of the company at \$10 a share. * * *"

Upon the faith of said article Eldridge wrote to King on November 26, 1907, and by December second had sent to him \$1,081.33 "in full for one \$1,000 Douglas Copper Co. bond." On January 7, 1908, King wrote to Eldridge that he found by reference to his books that he had placed an order for one six

per cent convertible bond. "Delivery of this bond has been delayed for the reason that I have been engaged in negotiations for the purchase of a number of the original Series A bonds of the Douglas Copper Company at a price which would enable me to sell them on the basis of \$152 for each \$100 bond. As these original bonds are convertible into stock of the company at par \$5 per share at any time between this date and December 31, 1909, at the option of the holder, they are easily worth more than double the price of the second series for which you have subscribed and which are only convertible into stock during the year 1909 at the rate of \$10 per share. I find that I shall be able to fill a limited number of orders for these original Series A bonds of the Douglas Copper Company at the rate of \$152 for each \$100 bond, and if you desire to avail yourself of the privilege of subscribing for one of these original bonds in lieu of the second series bond for which you have already subscribed, I shall be glad to credit you with the amount already paid, \$1,081.33, and on receipt of the difference, \$438.67, will forward you one of the original Series A bonds, denomination \$1,000, which is convertible at your option into 200 shares stock of the company at any time from this date until December 31, 1909."

Eldridge on January ninth accepted this suggestion and sent to King a draft for \$438.67, which, added to the amount theretofore forwarded, amounted to \$1,520, "in full payment for one of the 6% convertible bonds of the Douglas Copper Company, denomination \$1,000 of the original Series A, convertible at my option into 200 Shares stock of the company at Five dollars per share at any time from this date until Dec. 31, 1909."

Eldridge never received the bond for which he had subscribed, nor anything else, except some worthless promissory notes, long after the event. King became a bankrupt and was subsequently indicted and convicted. In April, 1908, Eldridge filed a claim in bankruptcy against him, which was allowed. He has not received any dividend, nor is he likely to. Long after the filing of this claim in bankruptcy against King he was advised by a firm of attorneys at Boston that he probably had a claim against the Douglas Copper Company and thereupon, at the suggestion of these attorneys, and on March 13,

App. Div.] First Department, March, 1912.

1909, Eldridge executed an assignment of his claim to one Charles H. Ryan. On April 22, 1909, said Ryan executed an assignment to "William Sweeney of New York in the County and State of New York" of "all the claims, demands and rights of action which, under and by virtue of an assignment to me by M. L. Eldridge dated March 13, 1909, I now have against the Douglas Copper Company."

This action was brought by said Sweeney in the City Court of New York.

The Douglas Copper Company is a foreign corporation created under the laws of the State of Maine, but its general offices are located in the city of New York. The complaint sets up the payment of \$1,520 upon the date set forth to C. F. King, the duly authorized agent of the Douglas Copper Company; that said sums of money were paid to and received by the said King as agent of the Douglas Copper Company for the purchase of one \$1,000 bond of the Douglas Copper Company, series A, at the agreed price and value of \$1,520, which the said King as agent duly agreed to deliver; that in violation of said agreement the said bond was never delivered to or tendered to the said Eldridge or his assigns, nor was the equivalent thereof, \$1,520, or any part thereof returned or tendered; and, after setting up the assignments from Eldridge to Ryan and from Ryan to Sweeney, the complaint alleges "That the plaintiff herein elects to rescind the contract made between M. L. Eldridge and the Douglas Copper Company" and averring that he has been damaged in the sum of \$1,520 demands judgment therefor. The action, therefore, is against an undisclosed principal upon a rescission for the amount paid.

Upon the trial the main question submitted to the jury was whether, at the time of the transactions complained of, King was the agent of the defendant company. The jury found a verdict for the plaintiff, which, together with an order denying the defendant's motion for a new trial, was affirmed by the Appellate Term. From the determination of the Appellate Term and from the judgment of the City Court and the order denying a new trial the defendant appeals.

The two questions which we deem it necessary to discuss are, *first*, was the evidence sufficient to support the finding of

First Department, March, 1912.

[Vol. 142]

agency ? and, *second*, was the filing and allowance of the claim in bankruptcy against the agent, King, such an election as estopped pursuit of the principal, the defendant company ?

Four contracts between King and the company were in evidence. The first was a letter from King dated March 25, 1905, addressed to the vice-president of the Douglas Copper Company, 42 Broadway, New York: "In accordance with memorandum covering proposition submitted to you yesterday, and your telegram of this date informing me that the same has been approved, I now submit in writing my proposition in detail, which memorandum will serve the purpose of contract between us. I agree to become sole financial agent for the Douglas Copper Company and to undertake to sell the company's six per cent convertible bonds to the amount of * * * \$400,000, and to pay to the company a net price of eighty-five per cent of the par value thereof for all bonds sold. I agree to undertake to sell bonds to the amount of * * * \$150,000 within four (4) months from date of this memorandum, it being understood, however, that should I be unable to sell bonds to the full amount of the * * * \$150,000 within four (4) months from this date, then in that case the company will provide me with bonds to be used as collateral security for the purpose of negotiating a loan for such an amount as may be required to meet the urgent demands of the treasury at the time, which, however, it is understood will be limited to an amount which may be necessary to bring the total cash receipts up to * * * \$150,000. * * * It is agreed that I may sell the bonds at such price as I may fix from time to time, but that in no case will I offer through newspaper or magazine advertisement to sell the bonds at less than par. I agree to begin immediately an active campaign for the sale of these bonds. * * * In the event of my failure to sell bonds to the amount of * * * \$25,000 quarterly, * * * then in that case the company shall have the right to cancel contract—otherwise the same shall be in force in accordance with terms and conditions here agreed to until December thirty-first, A. D., 1906, during which period it is expressly understood that I shall be the sole and exclusive financial agent for the securities of the Douglas Copper Company," etc. This was signed by the Doug-

App. Div.]

First Department, March, 1912.

las Copper Company by its vice-president under seal, and it was authorized and ratified at a meeting of the directors of the company.

The second contract, dated August 16, 1905, stated that the company had \$338,400 par value of its six per cent convertible bonds which it desired to have sold; "and whereas the party of the second part is in the business of dealing in investment securities and desires to undertake the sale of said bonds, * * * the party of the second part agrees to become the sole financial agent for the sale of the * * * 6% convertible bonds of the Douglas Copper Company to the amount of * * * \$338,400 par value, and to pay said company at its office in New York, a net price of * * * 85% of the par value thereof, plus one-half of the excess price over 110 for all bonds sold," and agreed to sell and pay for said bonds in minimum amounts monthly as provided. This contract was to expire February 28, 1906.

The third contract bears date of January 3, 1906, and recites the previous contracts, makes changes therein and substitutes a new first clause as follows: "The party of the second part agrees to become the sole financial agent for the sale of the 6% convertible bonds of the Douglas Copper Company from date of this amended agreement to the amount of * * * \$218,900 par value and to pay said company at its office in New York a net price of 85% of the par value thereof for all bonds sold." There were other changes and the contract was to terminate June 1, 1906.

The fourth contract was dated September 9, 1907, and provides: "Whereas the party of the first part * * * is about to make a new issue of ten (10) year six per cent (6%) debenture bonds to the amount of * * * \$300,000, the same to be convertible into stock of the Douglas Copper Company at any time during the year 1909 at the option of the holder on the basis of * * * \$10 per share, and which issue it desires to sell, * * * the party of the second part agrees to become the sole financial agent for the sale of said issue of bonds, or so much of said issue as the party of the first part shall desire to sell * * * and said party of the second part further agrees to pay the said Douglas Copper Company at

First Department, March, 1912.

[Vol. 149.]

its office in New York a net price of * * * 85% of the par value thereof for all said bonds that said party of the second part shall sell. * * * It is mutually agreed and understood by and between the parties hereto that this contract shall terminate on the 31st day of December, 1907, and that if the said party of the second part has not before that date sold all of said bonds, he shall have no right to call upon the company for any necessary balance after said date for any unsold balance after said date. * * * In further consideration of this contract, the party of the first part hereby agrees with the party of the second part to extend the convertible privilege on all bonds of a previous issue, which are at this date entitled to conversion for two (2) years. * * * The party of the first part hereby agrees to furnish the bonds to the amount that may be agreed upon as above stated in section first, and for the price above stated, as called for by the party of the second part in accordance with the terms of this agreement."

The appellant claims that those contracts were vendor and vendee contracts and created no relation of principal and agent. In this we do not agree. Upon their face King was created the sole financial agent for the purpose of disposing of various securities which the company desired to sell. There was no obligation upon his part to take and pay for a single bond. What he agreed to do was to sell the bonds for the company. He had the privilege of advertising them for sale and of selling them. It was intended that he should initiate, and he did initiate, a financial campaign for the purpose of selling said bonds. The limitation was placed upon him that he should not sell them for less than par and he was required to pay a net price of eighty-five per cent to the company on all that he sold. The names of the purchasers of the bonds were sent by him to the company before the bonds were delivered. So that it seems to me that the relation created was that of agency. That the company took this view is illustrated by the circular sent out to its stock and bondholders, stating some general figures and information and concluding: "In reply to many inquiries that have been received recently, the company desires to state that it has suffered no loss whatever through the failure of Mr. C. F. King, and that in future it is the purpose of the company to dispense

App. Div.]

First Department, March, 1912.

with the services of any fiscal agent, and to communicate directly with its own security holders."

That is certainly an admission of the character of the previous relation existing between Mr. King and the company. King also sold the stock of the company on a commission. He sent in the blanks upon which the subscriptions were made; he attended to the conversion of the bonds into stock; in fact he did everything that a general financial agent could do between the company and his clients. The company was aware of his newspaper campaigns; it made suggestions; it received copies of his paper; complained if it did not receive them. There was abundant evidence, as it seems to me, to justify the finding of agency.

It is claimed that even if it be conceded that at the time Eldridge sent his money to King, King was the agent of the company, he was so only as to \$300,000 of six per cent debenture bonds which King advertised in his paper of November 23, 1907, and for one of which Eldridge originally subscribed; that his agency for the class A bonds had long since expired; that when King induced Eldridge to change his subscription to the class A bonds and Eldridge sent \$438.67 in addition King was acting solely on his own account, and that as the complaint counts on the class A bond no cause of action was established. We think an issue of fact was here presented; that the circular above alluded to showing that King had been the general fiscal agent of the company, as well as that at the time of its issue \$100,000 worth of class A bonds were still in the possession of the company, the testimony of King's secretary that all the kinds of securities were passing through his office in October, November and December, 1907, as before; the testimony of the vice-president of the company that there were a few "straggling orders" coming in at various times that were filled, and certain letters which show that although the time of expiration of the class A contract had arrived, transactions in accordance therewith between King and the company still continued, and especially the letter which continued it until a three days' notice of cancellation, there being no proof that said notice was ever given, constituted enough evidence to support the verdict upon this point.

First Department, March, 1912.

[Vol. 149.]

Second. What was the effect of the filing and allowance of the claim in bankruptcy against the agent King?

In his dissenting opinion in *Tew v. Wolfsohn* (174 N. Y. 272) Judge CULLEN said: "The authorities differ as to what constitutes an election, and in some cases it has even been held that the recovery of a judgment against the agent, without satisfaction, will not be deemed conclusive of such election."

But there has been no difference of opinion that an election must be predicated upon full knowledge of the facts. In *Sanger v. Wood* (3 Johns. Ch. 416) Chancellor KENT said: "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

In *Coleman v. First National Bank of Elmira* (53 N. Y. 388) Judge ANDREWS said: "But one who deals with an agent is not concluded from resorting to the principal unless it distinctly appears that with full knowledge of all the facts he elected to take the sole responsibility of the agent and that he designed to abandon any claim against the principal. (*Thompson v. Davenport*, 9 B. & C. 78.)"

In *Remmel v. Townsend* (83 Hun, 353) it was held that the act of electing between two remedies presupposes such knowledge on the part of the one performing the act that he has an opportunity of choosing which of two or more courses he will pursue, and if he understands that there is but one course he can take he cannot be said to have made a choice by taking such course.

In *Brown v. Reiman* (48 App. Div. 295) plaintiffs brought an action to recover the purchase price of two sealskin garments bought by the defendant's daughters, alleging that they were his duly authorized agents. Plaintiffs had previously obtained judgment against the daughters, who had initiated bankruptcy proceedings to rid themselves of the obligations of said judgments. It was in the course of said proceedings that evidence was given and information obtained which established the agency of the daughters. The court, in affirming a judgment for the plaintiffs, said: "This being the case, the relation of principal and agent becomes established; and when it is further made to appear, as it is by the plaintiffs' testimony,

App. Div.]

First Department, March, 1912.

that the existence of this relation was not fully disclosed until after the commencement of the bankruptcy proceedings, it cannot be said that the plaintiffs have elected to rely solely upon the responsibility of the agents, nor that they were concluded by reason of the actions which were brought against such agents from pursuing the principal when his existence became known; for it is a well-settled rule that a creditor cannot make an election either of remedies or parties without first realizing that the opportunity of exercising his preference is afforded him."

And all of the cases which have considered the question have proceeded upon the fundamental fact of the possession of full knowledge of all the facts by the person held to have elected. (*Cobb v. Knapp*, 71 N. Y. 348; *Tuthill v. Wilson*, 90 id. 423; *Knapp v. Simon*, 96 id. 284; *Fowler v. Bowery Savings Bank*, 113 id. 450; *Conrow v. Little*, 115 id. 387; *Terry v. Munger*, 121 id. 161; *Le Merchant v. Moore*, 150 id. 209.)

In the case at bar, at the time Eldridge filed his claim against King in the bankruptcy proceedings, he did not know the facts. He supposed, and testified, that he was dealing directly with King. He had no knowledge of the contracts nor the course of dealing between King and the defendant, upon the evidence of which the jury has found that the defendant was the undisclosed principal of King. Without knowledge there can be no election. Upon the facts as they appear Eldridge was not estopped from pursuing his claim against the defendant upon discovery of the true relations existing between it and King.

The determination of the Appellate Term should be affirmed, with costs and disbursements to the respondent.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and MILLER, JJ., concurred.

Determination affirmed, with costs.

First Department, March, 1912.

[Vol. 149.]

RUDOLF C. VON BAYER, Respondent, *v.* THE NINIGRET MILLS COMPANY, Appellant.

First Department, March 15, 1912.

Contract—agreement to secure loan—action for commissions — performance by plaintiff and breach by defendant—evidence.

The plaintiff in an action for commissions alleged that he was employed by the defendant to secure a loan of \$50,000 "more or less," to be secured by its first mortgage bonds under certain terms and conditions; that he had performed his part of the contract, but that defendant failed to keep and wrongfully repudiated and broke the agreement, and that plaintiff was thereby damaged in the sum of \$20,000. The answer was in effect a general denial. A recovery was allowed upon the theory that plaintiff procured one S., who was willing to loan \$50,000 to the defendant on the terms upon which the plaintiff was employed to procure it, and that he tendered a certified check to the defendant but that it was refused.

Held, that under the evidence plaintiff failed to establish a cause of action; that defendant had withdrawn its proposition before there was an unqualified acceptance thereof by S., who was unwilling to make the loan unconditionally.

APPEAL by the defendant, The Ninigret Mills Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of March, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 20th day of March, 1911, denying the defendant's motion for a new trial made upon the minutes.

William T. Keleher, for the appellant.

Arnold Lichtig, for the respondent.

LAUGHLIN, J.:

The plaintiff alleges that he was employed by the defendant on the 28th day of April, 1909, to secure a loan of \$50,000, "more or less," to be secured by its first mortgage bonds under certain terms and conditions; that he "at all times duly kept and performed each and every covenant and condition of the said agreement upon his part to be kept and performed, and, pursuant to the said agreement, undertook and conducted negotiations with various persons, firms and corporations, and

App. Div.]

First Department, March, 1912.

performed work, labor and services in connection with the securing of said loan, and obtained a large number of subscribers to the bonds of the defendant corporation, all of which was of great benefit and value to the defendant ;" but that defendant failed to keep and wrongfully repudiated and broke the agreement, and that he thereby lost the benefit of his agreement and lost the time devoted by him in securing subscribers to the bonds of the defendant, to his damage in the sum of \$20,000. The answer is, in effect, a general denial. Without any amendment the complaint appears to have been regarded upon the trial as one for commissions, upon the theory of full performance, and it was so submitted to the jury, and the recovery, under the charge, was upon the theory that the plaintiff procured one Sutro, who was ready, willing and able to loan \$50,000 to the defendant on the terms upon which the plaintiff was employed to procure it, and that he tendered the money or a certified check to the defendant, but that it was refused. On full performance plaintiff would have been entitled to a commission of two and one-half per cent on the amount of the loan procured, or \$1,250 on \$50,000. He conceded a credit of \$175. An item of \$475 claimed by defendant as a credit was in dispute and the jury found in favor of the defendant thereon, and awarded a verdict for the balance together with interest thereon. The uncontested evidence shows that the attention of the plaintiff was drawn to the question of financing the defendant by its selling agent in New York; that one Sutro manifested a willingness to make a temporary loan to the defendant of \$5,000 or \$10,000, which was the amount stated to be needed by its selling agent provided he received a satisfactory report with respect to defendant, that a short time thereafter plaintiff accompanied the selling agent to the defendant's plant at Mystic, Conn., and after some negotiations with the president and superintendent and others there, a meeting of the board of directors was called on the 28th of April, 1909, and he verbally submitted a proposition to the company by which he was to secure a loan of \$50,000, more or less, and to receive a commission of two and one-half per cent, and the banker making the loan should receive a commission or bonus of ten per cent payable in bonds,

First Department, March, 1912.

[Vol. 149.]

and fifty-one per cent of the common stock of the company; that the loan was to be secured by a first mortgage bond issue on the plant at six per cent per annum, payable semi-annually, ten per cent of the bonds to be retired annually, and that the board of directors accepted the proposition and a formal resolution was adopted authorizing the president to carry out the agreement. After that time plaintiff had many consultations with Ledwidge, the secretary; O'Sullivan, the president, and Renner, the sales agent of the company, about the work he was doing and intended to do, and he prepared a report in book form with respect to the company's assets and liabilities and business, which he presented to Sutro. His version of what Sutro said when the report was presented is as follows:

"He told me that if the conditions as outlined in the book were facts, and I showed him that they were facts, and verified it by original facts as contained in the book, he said if the company came up to the terms as agreed, he would make the loan of \$50,000, more or less." The evidence shows that the defendant was desirous of obtaining a loan immediately; that its plant was heavily mortgaged and that it had some seven or eight lien creditors and it desired to enlarge its plant with a view to increasing its business; that Sutro never unconditionally agreed to make the loan until after the defendant declared the deal off on the 1st day of July, 1909; that the plaintiff never notified the defendant until after said date that he had procured a party ready, willing and able to make the loan on the terms proposed; that the plaintiff and Sutro entered into an agreement by which plaintiff was to go to Mystic and there obtain subscriptions for the bonds upon an agreement by which part of the bonus which the banker was to receive was to be given to the subscribers, and the remainder was to be divided between him and Sutro, and, pursuant to this arrangement, he spent a large part of the time between said 28th day of April, 1909, and tenth day of July, thereafter, at and about Mystic, endeavoring to obtain such subscriptions, and interviewed more than one-half of the inhabitants, and represented to them, generally, that Sutro would not make the loan unless he succeeded in thus obtaining subscriptions for the bond issue; that he did in fact obtain subscriptions from the officers, stock-

App. Div.]

First Department, March, 1912.

holders and creditors of the defendant company, and from the citizens of Mystic and vicinity for from \$14,000 to \$40,000 of the bonds; and that it was at Sutro's suggestion that the plaintiff negotiated with the lien creditors of the defendant to take bonds in payment of their claims, as Sutro did not wish to advance the cash to pay off such liens. The plaintiff denies that Sutro was unwilling to make the loan unless he thus placed the bonds but he concedes that in obtaining the subscriptions for the bonds he was acting both for Sutro and in his own interests, and that the proposition would be the more attractive to Sutro the larger the amount of the subscriptions he obtained for the bonds. Finally, according to the testimony of the plaintiff, it was agreed that the loan would be consummated on the first day of July at Sutro's office, and he and Sutro had arranged to have attorneys in readiness to prepare papers for the bond issue *if needed*. At the time agreed upon for closing no one representing the defendant came, and he was on that day informed by representatives of defendant that the deal was off because defendant decided that it was not a money-making proposition, and pointed to the ease with which the plaintiff had secured subscriptions for the bonds at Mystic, and stated that the defendant could itself thus raise the money, and that the terms which it had agreed to pay for the loan were out of all proportion, and they offered him a commission of five per cent to "put the deal through under their own handling." At the request of plaintiff, he and the defendant's secretary and sales agent met at Sutro's office the next day, and defendant's secretary stated that defendant figured that it would have to come to New York to obtain a loan, but since the plaintiff was able to raise a considerable part of it at Mystic it would be unwise for defendant "to pay the fee and give up the stock as they would if they dealt with Mr. Sutro," and Sutro, on being asked if he considered it a good proposition for defendant, replied that it certainly was not, if defendant could get the money cheaper at Mystic; and Sutro thereupon asked if they would accept his certified check, to which they replied that they would not take a check if offered to them, and this ended the negotiations. There was no tender of a certified check and no tender of the money, or demand that defendant perform.

The money that was paid to plaintiff, according to the testimony given on the part of the defendant, was advanced or loaned at his request while he was soliciting subscriptions at Mystic, and this is only controverted by him to the extent that he claims that before the proposition of April 28, 1909, the defendant had agreed to pay him \$300 for preparing a report to be presented to Sutro, regardless of whether or not the same was accepted by Sutro. The evidence on the part of the defendant tends to show that the condition upon which Sutro was willing to make the loan was that subscriptions by responsible parties in and about Mystic be first obtained for the bonds and placed in his hands; that these subscriptions might be payable in installments, but upon their being obtained and being presented to him and being found satisfactory he would advance the amount of the loan less commissions; that the plaintiff was not able to obtain subscriptions for the entire amount, and for only about \$14,000 of the bonds, and many of the subscribers repudiated their subscriptions, and both he and Sutro abandoned the enterprise, and controverted the evidence with respect to the request whether certain officers of defendant would accept a certified check.

We are of opinion that the plaintiff failed to establish the cause of action alleged or any cause of action. In any view of the evidence the defendant had withdrawn its proposition before there was an unqualified acceptance thereof by Sutro. Moreover, the preponderance of the evidence shows that Sutro was unwilling to make the loan unless subscriptions for the bonds were first obtained. If Sutro had been willing to make the loan unconditionally, it is highly improbable that the defendant would not have insisted upon receiving the money, and that its officers and creditors would have subscribed in large amounts for the bonds.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN, CLARKE and MILLER, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

JOHN S. SHEA, Sheriff of the County of New York, Plaintiff, v.
ERNEST L. CONANT, Defendant.

First Department, March 15, 1912.

Attorney and client — injunction restraining payment of amount in controversy — execution — sheriff — duty to hold funds — liability for acts of deputies.

Conant, an attorney, was enjoined during the pendency of an action brought against him and a third person by Casanova, a former client, or until the entry of an order of the court, from paying over to the codefendant or any other person the sum of \$5,000, which was the amount in controversy. While Conant was so enjoined an attempt was made to attach the sum in an action by his codefendant against Casanova and another, and a levy was made upon the money in controversy in the possession of Conant. Thereupon Conant filed with the sheriff a copy of the injunction order and notified him that he had no other property subject to the attachment. Judgment was entered in the first action and subsequently the plaintiff recovered judgment in the second action. The sheriff received \$5,000 from Conant under the first judgment, and when execution was issued upon the judgment in the second action Conant notified the sheriff in writing that said execution could not be satisfied out of funds in his hands, giving the same reasons as in his former notice.

Held, that Conant should not be compelled to pay the same amount a second time in satisfaction of the judgment secured while he was enjoined from paying it over to any one; that his notice to the sheriff of the existence of the injunction and that he only had one fund belonging to his former client relieved him from liability.

It was the duty of the sheriff to have held the fund until the ownership thereof could be determined.

A sheriff is charged with notice of matters of record in his office and with the acts of his deputies.

Even though a sheriff acts through different deputies in two actions, his knowledge and responsibility are the same.

MOTION by the defendant, Ernest L. Conant, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon the verdict of a jury in favor of the plaintiff rendered by direction of the court after a trial at the New York Trial Term in November, 1911.

Francis A. O'Neill, for the plaintiff.

Nelson L. Robinson, for the defendant.

DOWLING, J.:

This action was brought by the sheriff of the county of New York pursuant to the provisions of section 655 of the Code of Civil Procedure, to reduce to possession, under a warrant of attachment, the sum of \$5,000 claimed to be owing by the defendant to the attaching debtor. By stipulation the complaint was amended so that the action became one under section 708, subdivision 4, of the Code of Civil Procedure, to collect a debt or other thing in action attached. Upon the trial a verdict for plaintiff having been directed in the sum of \$5,046, the exceptions were directed to be heard in this court in the first instance, judgment in the meantime being suspended.

The facts appearing from the record stated chronologically are as follows: Defendant, who had been the attorney for Pedro C. Casanova, was served on May 26, 1910, with an injunction order issued in the action of Pedro C. Casanova against Ellen Spencer Mussey and Ernest L. Conant in the Supreme Court, New York county, whereby Conant was enjoined and restrained during the pendency of the action or until the due earlier entry of an order of the court from paying over to the defendant Ellen Spencer Mussey or any other person the sum of \$5,000 or any part thereof, which was stated to be the amount in controversy therein. From the complaint in said action it appears that it was claimed that Conant had received the sum of \$5,000 belonging to plaintiff on April 29, 1910, and still held the same, but declined to pay it over because of the claims of the codefendant Mussey. While Conant was still so enjoined a warrant of attachment was issued on September 28, 1910, in an action brought in the Supreme Court, New York county, wherein Ellen Spencer Mussey was plaintiff and Pedro C. Casanova and Mary L. Montalvan were defendants, a copy whereof was served on Conant on September 29, 1910, and pursuant to which a levy was made by the sheriff of the county of New York upon the property of the defendant Pedro C. Casanova in the possession of the said Conant. That action was brought to recover the sum of \$5,000 damages for breach of contract. Thereupon, on October 7, 1910, Conant filed with the sheriff a copy of the injunction order above referred to, and on October 17, 1910,

App. Div.] First Department, March, 1912.

gave a certificate to the sheriff that, as he was enjoined by said order "during the pendency of said action from paying out to any person the sum of \$5,000 in controversy, I hereby notify you that said injunction is still in force and that I am holding the said sum of \$5,000 in my possession and control and that I have no other sum of money and no other property of any sort subject to the aforesaid attachment." Thereafter, on November 7, 1910, judgment was entered for \$5,000, without costs, in favor of plaintiff in the action of *Casanova v. Conant*, the demurrer of the defendant Mussey to the complaint having been sustained and judgment having been rendered against the defendant Conant upon the pleadings. The judgment provided "that final judgment be and the same is hereby entered in favor of the plaintiff Pedro C. Casanova against the defendant Ernest L. Conant for \$5,000 now in said defendant's hands belonging to said plaintiff, without costs; and it is Further Ordered that the said plaintiff Pedro C. Casanova recover of the said defendant Ernest L. Conant the sum of \$5,000 now in said defendant's hands belonging to said plaintiff and that execution issue therefor." Thereafter, on January 20, 1911, judgment was entered in favor of plaintiff against defendant Pedro C. Casanova in the action of *Mussey v. Casanova and Montalvan* for \$5,294.39 damages and costs, and an execution was issued thereupon and received by the sheriff of the county of New York January 21, 1911, directing him to satisfy the same firstly out of the property of defendant theretofore attached, and upon which a levy had already been made, and, if that was insufficient, out of the other property of the defendant in the manner specified. On January 23, 1911, Conant notified the sheriff in writing that said execution could not be satisfied out of Casanova's funds in his hands, giving the same reasons as in his letter of October 17, 1910, and delivering therewith a certified copy of the injunction order. On March 28, 1911, the sheriff of the county of New York collected from Conant the sum of \$5,000 under the judgment in *Casanova v. Conant*, receiving from the sheriff a receipt therefor, which specified that it was paid on account of the execution in that action. The execution in *Casanova v. Conant* was returned March 31, 1911, satisfied to the extent of

\$4,850, unsatisfied as to balance; the execution in *Mussey v. Casanova* has never been returned.

Upon the record before us it is plain that Conant had but one fund of \$5,000 in his possession belonging to Casanova, although error was committed in excluding testimony offered on defendant's behalf to show that he not only had no other moneys or property of Casanova's, but that Casanova had no claim of any kind against him save for the one fund of \$5,000, which was the balance due on their accounting. The certificate of Conant, however, that this was the only property of Casanova's which he had has not been attacked in any way.

The question now is whether Conant, having once paid over the fund of \$5,000 which he held to the sheriff in satisfaction of the judgment in *Casanova v. Conant*, shall be compelled to pay the same amount a second time in satisfaction of the judgment in *Mussey v. Casanova*, in which action the fund was attached in his hands while he was enjoined from paying it over to any one. Or, to state it differently, was Conant remiss in not paying over the fund to the sheriff to be held under the attachment in *Mussey v. Casanova* as soon as final judgment was entered in *Casanova v. Conant* (November 7, 1910), or as soon as he knew of its entry (March 25, 1911); and was he further remiss in not advising the sheriff when he paid over the fund under the execution in *Casanova v. Conant* that it had been theretofore held under a levy by the sheriff by virtue of the attachment in *Mussey v. Casanova*? Or was the sheriff remiss in not holding the funds collected for the account of Pedro C. Casanova upon his judgment, while there was outstanding a judgment and attachment against the same party, until there could be a determination of the right to the fund so realized as between Casanova and Mussey?

As Conant never knew of the existence of the judgment until March 25, 1911, he cannot be charged with any duty before that time to act in reference thereto which, under the terms of the injunction order was a vacatur of the latter. But by the very terms of that judgment Casanova was declared to be entitled to recover from Conant the fund of \$5,000, the only one he held, and which had been the subject of the injunction. Therefore, as by the judgment Conant was required to pay to

App. Div.] First Department, March, 1912.

Casanova the very fund which down to the time of its entry he had been prevented by injunction from paying to any one, there was no time when Conant could have paid this fund over to any one save to Casanova under the judgment. When demand was made upon him by the sheriff for the fund pursuant to the Casanova judgment, he had no recourse save to pay it. Nor was he under any obligation to make any further statement to the sheriff respecting the prior services of the attachment upon him, for that attachment likewise came from the same sheriff's office, and his certificate given upon the levy and his second certificate of January 23, 1911, were specific notices of the existence of the injunction order of which he had also filed a certified copy with the sheriff.

On March 28, 1911, when Conant paid over \$5,000 in answer to the demand made upon him by the sheriff to satisfy the Casanova judgment against him, the situation was that the sheriff of the county of New York had collected from Conant the only fund or property belonging to Casanova in his hands; he had collected it for the benefit of the plaintiff in that action, Casanova; but he also had in his hands an attachment against that very fund belonging to Casanova, in an action wherein judgment had been obtained against Casanova in favor of Mussey; he knew that payment of this fund to him under the attachment had previously been withheld because of an injunction in the suit of Mussey against Casanova, as he had twice been notified and two certified copies of which injunction order had been deposited with him. There is no pretense that Conant had more than one fund, or that the two executions referred to aught save the same fund.

Under these circumstances it was the duty of the sheriff to have held the fund until the ownership thereof could be determined as between Casanova and Mrs. Mussey. Upon his application their conflicting claims could have been heard. So far as this record shows, the only outcome possible was to award the money to Mussey. Conant would then have satisfied the judgment against him and have paid the fund over but once; Casanova would have satisfied the judgment against him to the extent of \$4,850, the fund less the sheriff's fees; and Mrs. Mussey would have received \$4,850 on account of her judg-

First Department, March, 1912.

[Vol. 149.]

ment. Because of the failure to hold the funds, Casanova has received the \$4,850, Mrs. Mussey has received nothing and Conant is sought to be held twice for the same fund. Of the matters of record in his office the sheriff is charged with notice, as well as with the acts of his deputies, for as is said in Crocker on Sheriffs, quoted with approval in *Matter of Flaherty v. Milliken* (193 N. Y. 567): "The sheriff is identical, in contemplation of law, with all his officers, and is civilly and directly responsible for their acts, defaults, torts, extortions or other misconduct, whether it be wilful or inadvertent in the course of the execution of their duties. He is liable to the party aggrieved for any neglect in the execution of process or in returning the same, for an escape or for not paying over money collected on execution in the same cases and to the same extent as if the fault was his own." Even though the sheriff acted through different deputies in the two actions, his knowledge and responsibility are the same.

The exceptions must, therefore, be sustained and a new trial ordered, with costs to defendant to abide the event.

INGRAHAM, P. J., McLAUGHLIN and MILLER, JJ., concurred.

LAUGHLIN, J. (concurring):

I concur in sustaining the defendant's exceptions and in ordering a new trial, but solely upon the ground that a question of fact was presented for the consideration of the jury as to whether or not the plaintiff was informed by the defendant or knew that the execution upon which he collected the money was for the same fund which had been attached and for which he then held an execution in favor of the plaintiff in the attachment action.

The execution commanded the sheriff generally to collect the sum of \$5,000 out of the personal property of the defendant, and not to collect a particular fund, and I think that he was neither required to examine the judgment nor chargeable with knowledge that it related to a particular indebtedness or fund. The defendant, however, gave evidence tending to show that he informed the deputy sheriff, to whom he paid the money, that the same fund was involved in both actions. This was controverted by the testimony of the deputy sheriff. A

App. Div.]

First Department, March, 1912.

question of fact was thus presented. The defendant should have refused to satisfy the execution or have had it stayed upon the ground that he held the fund subject to the warrant of attachment and the execution in that action, or, on paying the money to the deputy sheriff, he should have so notified him and should not have accepted a receipt reciting that the payment was made to the deputy sheriff on account of the execution upon which he did not wish to have it applied.

Exceptions sustained, new trial ordered, costs to defendant to abide event. Order to be settled on notice.

LOTTIE KENT, Respondent, *v.* EDWARD J. DE COPPET and Others, Doing Business under the Firm Name and Style of DE COPPET & DOREMUS, Appellants.

First Department, March 15, 1912.

Principal and agent—insolvency of broker selling stock on the exchange—rights of owner—closing contracts with insolvent firm—undisclosed principal.

A broker, pursuant to instructions from an owner of stock, sold certain shares upon the exchange in the ordinary way to defendants, who were also brokers, and who had no knowledge that the vendor was not making the sale on its own account. By the terms of the sale the certificate of stock was to be delivered and payment made the day following. Shortly after the sale the vendor notified the exchange that it was insolvent, and the defendants, in accordance with the rules of the exchange, proceeded to close all its contracts with the insolvent firm. They set off the purchase of the shares in question against a like number of shares which they had contracted to sell, paying the difference in price to the receiver in bankruptcy of the insolvent firm. On the morning following the failure the owner called at the office of the defendants and made a formal demand that they take and pay for the stock. This they refused to do, and the owner thereafter assigned the stock and all his right of action against the defendants to the plaintiff, who commenced this action to recover the purchase price.

Held, that the contract for the sale of the stock being executory the announcement of the failure of the vendor was equivalent to a request to defendants to close their contracts, which they did, and hence plaintiff could not thereafter recover.

First Department, March, 1912.

[Vol. 149.]

The defendants were entitled to regard the vendors as the owners until they were notified of the real owners' rights.

It seems, that plaintiff might have recovered the difference between the price of the stock defendants contracted to purchase and the stock they set off against the claim.

The rights of an undisclosed principal are subject to claims acquired in good faith against the agent; but this rule does not apply where the persons dealing with the agent knew, or are chargeable with knowledge, of the existence of an undisclosed principal.

MILLER, J., dissented, with opinion.

APPEAL by the defendants, Edward J. De Coppet and others, doing business under the firm name and style of De Coppet & Doremus, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of June, 1911, upon the decision of the court rendered after a trial at the New York Trial Term, a jury having been waived.

Walter F. Taylor, for the appellants.

Henry Escher, Jr., for the respondent.

MC LAUGHLIN, J.:

The defendants are stockbrokers doing business upon the New York Stock Exchange and this action is brought for the purpose of enforcing a contract for the sale to them of certain stock made upon the exchange in the usual way by other brokers who were acting for the plaintiff's assignor.

The appeal presents only a question of law, there being no contest between the parties as to the facts. On January 19, 1910, one James W. Escher, plaintiff's assignor, was the owner of twenty-five shares of the common stock of the Columbus and Hocking Coal and Iron Company, a certificate for which was in his possession. About eleven o'clock in the forenoon of that day he telephoned the firm of Lathrop, Haskins & Co., brokers dealing upon the New York Stock Exchange, to sell this stock — he having previously purchased it through them. This they did, selling upon the exchange in the ordinary way, to the defendants, at eighty-three and five-eighths. The offer to sell and the acceptance to purchase were in writing, signed by the respective brokers in their own names, and the defendants had no knowledge that Lathrop, Haskins & Co.

App. Div.]

First Department, March, 1912.

was not making the sale on its own account. After the sale Lathrop, Haskins & Co. sent a notice in the usual form to Escher, stating the price at which the stock had been sold and naming the defendants as the brokers to whom the sale had been made. This notice was received by Escher, either late in the afternoon of the same day or early the next morning. By the terms of sale the certificate of stock was to be delivered on the day following, when the purchase price was to be paid. The fact is not disputed that under the rules of the Stock Exchange governing such transactions, if this contract had been fully performed in the ordinary course of business, the stock would have been delivered to the defendants by Lathrop, Haskins & Co., and the purchase price paid to them without Escher's appearing in the transaction at all. But on the day of sale, and shortly thereafter, Lathrop, Haskins & Co. notified the exchange it was insolvent and unable to meet its obligations. An announcement of that fact was immediately made upon the floor of the exchange and then the defendants, in accordance with the rules of the exchange applicable to such cases, proceeded to close all its contracts with the insolvent firm. They then had a number of contracts, both for the purchase of stocks from Lathrop, Haskins & Co., and for the sale of stock to them. The stock which they had contracted to purchase they purchased from other brokers at prevailing prices, and the stock which they had contracted to sell they likewise sold to other brokers, with the exception of the twenty-five shares of Columbus and Hocking stock, which was set off against the twenty-five shares which they had contracted to purchase from them. Owing to the difference in prices at which these sales and purchases were made a balance of \$564.16 resulted in favor of Lathrop, Haskins & Co., which the defendants subsequently paid to the receiver in bankruptcy of that firm. On the morning following the failure of Lathrop, Haskins & Co., Escher, who had heard of it, called at the office of the defendants and presented to them his stock certificate, duly assigned and ready for transfer, with the notice of sale which he had received from his brokers, and a formal demand that the defendants take and pay for the stock. This they refused to do and Escher thereafter assigned the stock, and all his

right of action against the defendants in connection therewith, to the plaintiff, who thereupon commenced this action to recover the purchase price of the stock. The parties waived a jury trial and the court found in favor of the plaintiff for the full amount claimed. Judgment was entered accordingly and defendants appeal.

The appellants contend that the judgment is erroneous because under the rules of the Stock Exchange Lathrop, Haskins & Co. and the defendants, in the transaction complained of, acted as principals, and after the failure was announced settlement was made in accordance with such rules. One of the rules referred to provides that "No party to a contract shall be compelled to accept a substitute principal, unless the name proposed to be substituted shall be declared in making the offer and as a part thereof." Another, "When written contracts shall have been exchanged, the signers thereof only are liable." Also, "When the insolvency of a member or firm is announced to the Exchange, members having contracts subject to the rules of the Exchange with the member or firm shall without unnecessary delay proceed to close the same * * *." They contend that when Escher gave the direction to sell his stock he knew that Lathrop, Haskins & Co. dealt upon the Stock Exchange and that such dealings were subject to its rules. The defendants, undoubtedly, had the right to determine with whom they would contract (*Arkansas Smelting Co. v. Belden Co.*, 127 U. S. 379; *Moore v. Vulcanite Portland Cement Co.*, 121 App. Div. 667), and in *Horton v. Morgan* (19 N. Y. 170) it was said: "The practice at the stock board, by which the brokers only, and not their customers, are known in their dealings with each other, was not unreasonable; and the plaintiff, by directing this purchase to be made, must be understood as consenting that it should be done in the usual manner." When Escher gave the order to sell, he also knew and intended that the sale would be made upon the exchange and there is much force in the claim that thereby the rules and usages of the exchange, including the right to close the contract upon the insolvency of the broker, were imported into the contract by his authority. (*Bibb v. Allen*, 149 U. S. 481; *Springs v. James*, 137 App. Div. 110; *Skiff v. Stoddard*, 63 Conn. 198;

App. Div.] First Department, March, 1912.

cited with approval in *Richardson v. Shaw*, 209 U. S. 365; *Nickalls v. Merry*, L. R. 7 H. L. [Eng. & Ir. App. Cas.] 330.) If he did not know the rules of the exchange it was his own fault, and not that of the defendants. The notice of sale received by him from Lathrop, Haskins & Co. stated that the sale was "subject in all respects to the rules and regulations of the New York Stock Exchange," and this is undoubtedly what both of the brokers, who were parties to the transaction, intended. Under such circumstances it is difficult to see, as urged by the appellants, how Escher could obtain any other or greater rights to enforce the contract than the brokers themselves had. Defendants certainly cannot be held liable upon a contract other than the one which they actually made, and if the one made were different from the one which Escher intended and authorized then his remedy is against his agent and not against defendants.

In answer to the appellants' contention the respondent urges, and the decision of the trial court is upon the ground, that Escher was the undisclosed principal of Lathrop, Haskins & Co., and he could not be deprived of the benefit of his contract by the rules of the Stock Exchange making the brokers principals in their dealings with each other, and prescribing the manner in which contracts shall be closed upon the insolvency of a member; in other words, that the relation of customer and broker in transactions upon the exchange is, in general, subject to the ordinary rules and principles of agency. There is high authority for this claim. (*Leo v. McCormack*, 186 N. Y. 330; *Humphrey v. Lucas*, 2 Car. & K. 152; *Cooke v. Eshelby*, L. R. 12 App. Cas. 271.)

The conclusion, however, at which I have arrived renders it unnecessary in the case now before us to determine whether the appellants' or respondent's contention is correct, because, assuming that the transaction is governed by the ordinary rules and principles of agency, irrespective of the rules of the Stock Exchange, I am of the opinion that the plaintiff was not entitled to recover. The contract was not for the sale of the specific shares of stock owned by Escher. It would have been fully performed by the delivery to the defendants of the

requisite number of shares, regardless of their ownership and the shares were not to be delivered and the purchase price paid until the next day. On January nineteenth, therefore, the contract was wholly executory, and if on that day Lathrop, Haskins & Co. had, before their failure, requested the defendants to cancel the contract and they had consented to do so, it would have been at an end. The mere fact that Lathrop, Haskins & Co. were brokers would not have compelled defendants to inquire whether they had made the contract for an undisclosed principal and whether they had been authorized by him to cancel it. And for the same reason if instead of canceling a single contract Lathrop, Haskins & Co. had informed defendants they were unable to meet their obligations and requested them to close their contracts in the manner in which they were actually closed, I do not see how it can be doubted but that defendants would have been justified in complying with the request. Lathrop, Haskins & Co. actually had with the defendants, at the time of their failure, several contracts for the purchase and sale of different stocks, involving many thousands of dollars. To say that, under these circumstances, before taking any steps to protect themselves against loss, defendants would have been obliged to investigate each contract so as to find out whether an undisclosed principal were involved, and whether such undisclosed principal were able to perform, is to extend, as it seems to me, the right of an undisclosed principal beyond reason. No authority has, so far as I am aware, gone to that extent. But the announcement of the failure of Lathrop, Haskins & Co. upon the Stock Exchange, at their request, was equivalent to just such a request to defendants to close their contracts. For the purpose of the argument only, it may be assumed that if Escher had notified the defendants that the contract for the sale of the Hocking stock had been made for his account, before the announcement of the failure was made, and the brokers had thereby changed their positions, he might have enforced the contract. But he did not do so, and, without having any actual knowledge that he or any one besides the insolvent brokers were interested, the defendants did close the contract by setting off their contract for the sale of an equal number of

App. Div.]

First Department, March, 1912.

shares to the insolvents at a much lower price, thereby rendering themselves liable for the difference. It is possible Escher might have been entitled to this difference (*Cooke v. Eshelby, supra*), but, as is specifically stated in the respondent's brief, this action is not brought to recover the difference in price, and that question is not before the court; on the contrary, the respondent's claim is that, notwithstanding the settlement of the contract made by the brokers, Escher was entitled to enforce performance. The rule is well settled that the rights of an undisclosed principal are subject to claims acquired in good faith against the agent. (*McLachlin v. Brett*, 105 N. Y. 391; *Nichols v. Martin*, 35 Hun, 168; *Charlotte Iron Works v. American Exchange Nat. Bank*, 34 id. 26; *Hogan v. Shorb*, 24 Wend. 458.) This rule, of course, does not apply where the persons dealing with the agent know, or are chargeable with knowledge, of the existence of an undisclosed principal. (*Wright v. Cabot*, 89 N. Y. 570.)

The trial court held, relying upon certain English authorities, that the fact that Lathrop, Haskins & Co. were brokers dealing for others as well as themselves was sufficient to charge the defendants with such knowledge. But there is in this case the additional fact, not present in the English authorities relied upon, that the defendants actually closed their contracts with the insolvents at their request by actual sales and purchases. It is difficult to see, if thereafter Escher could compel the defendants to perform, how any one could deal with safety with a person known at times to act as an agent. Here, the brokers, the only persons known to the defendants in the transaction, announced their inability to meet their contracts. That inability might very easily have been due to the inability of the principals in behalf of whom they had contracted. Yet, if this judgment is to be sustained, it must be held that the defendants had no right to rely upon this announcement, and were bound to ascertain the identity of the real party in interest before closing any contract. The law is not so harsh and unreasonable. It imposes no such duty upon a person dealing with an agent known to act for himself as well as for others, especially where contracts made by such an agent and principal are as numerous and extensive as in the case before us.

First Department, March, 1912.

[Vol. 149.]

I understand the law to be as stated in *Le Marchant v. Moore* (150 N. Y. 209), where the plaintiffs had purchased stocks from the defendant brokers, through Evans & Co., plaintiffs' brokers. The purchase price had not been paid in full so that the defendants retained the stock as pledgees for the unpaid balance. HAIGHT, J., writing for the court, said: "The defendants, as pledgees, were entitled to regard Evans & Company as the owners until they were notified of the plaintiffs' rights. Thereafter they were bound to recognize the plaintiffs' claim and deal with the stock accordingly." This expresses, as it seems to me, the only point which we are called upon to decide in the present case. At the time the defendants were notified of Escher's claim, their contract with Lathrop, Haskins & Co. had been terminated. What rights Escher may then have had, if he had any rights against the defendants at all, it is unnecessary, for the reason heretofore given, to determine. He certainly did not have the right to enforce a contract which they, in perfect good faith, and without any knowledge whatever of his interest, had closed at the request of his brokers.

The judgment appealed from must be reversed, and a new trial ordered, with costs to appellants to abide event.

INGRAHAM, P. J., LAUGHLIN and CLARKE, JJ., concurred; MILLER, J., dissented.

MILLER, J. (dissenting) :

I am unable to assent to the proposition that the defendants are entitled to prevail in this action upon general principles of law, irrespective of the rules of the Stock Exchange. The defendants did not exercise their undoubted right of refusing to incur obligations to an undisclosed principal, but, without inquiry, they contracted with brokers in a market established exclusively for brokers. Perforce of the rules of that market, they and Lathrop, Haskins & Co. were principals *inter se*, but they were bound to know that the latter might be dealing for an outsider. The rule, therefore, that an undisclosed principal must take the contracts of his agent, subject to the equities existing between the latter and those contracting with him without knowledge of his agency, has no application to

App. Div.]

First Department, March, 1912.

this case. It is the law in this State, as well as in England, that one dealing, under the circumstances disclosed in this case, with a broker, though nominally as a principal, may not set off as against the undisclosed principal a prior debt of the broker. (*Judson v. Stilwell*, 26 How. Pr. 513; *Wright v. Cabot*, 89 N. Y. 571; *Barring v. Corrie*, 2 Barn. & Ald. 137; *Cooke v. Eshelby*, L. R. 12 App. Cas. 271. See, also, *Glenn v. Garth*, 133 N. Y. 18; *Baxter v. Duren*, 29 Maine, 434.) *A fortiori*, he cannot set off a subsequent contract made with the broker. In view of the way business is conducted in a market like the Stock Exchange, the defendants were equally bound to take into account the probability that the second contract was made for a different principal than the first. Without any agreement whatever, but assuming to act under the rules of the Stock Exchange, the defendants set off the second contract against the first and paid the difference in favor of the first contract, \$490.63, to the receiver in bankruptcy of the insolvent brokers. The other transactions between the two firms of brokers, which were closed in another way by the substitution of other contracts under the rules of the exchange, are in no way involved in this case. It is suggested that perhaps the plaintiff's assignor was entitled to said sum of \$490.63, but the appellants dispute even that, and no theory is suggested upon which it can be recovered. Said assignee, or his brokers for him, did not enter into a gambling contract with the defendants. He had twenty-five shares of stock to sell, his brokers made a contract to sell and deliver them to the defendants, and at the time for delivery he tendered the certificate, properly indorsed and stamped, and demanded the purchase price. This suit is to recover that purchase price. It may be that, if the defendants had substituted another contract by making a sale when the suspension of Lathrop, Haskins & Co. was announced, the plaintiff's assignor would have been bound by rules requiring him to accept the substituted purchaser and the difference between the purchase price of the first and the substituted contract; in that way his rights would have been preserved and everybody would have been protected; but it seems to me indubitable that he cannot be deprived of his bargain by a balancing of

First Department, March, 1912.

[Vol. 149.]

the accounts of the brokers *inter se* unless *that result* be required by the rules of the Stock Exchange.

The rules, quoted by my brother McLAUGHLIN, with respect to substitute principals and to the signers *only* of written contracts being bound, relate, as the entire context of article 24 plainly shows, to the relations of brokers *inter se*. The words "substitute principal" refer, not to an outsider, but to some other member of the exchange than the original broker. Undoubtedly, the rules contemplate that, as between themselves, the brokers shall deal as principals; but if they are to have the effect contended for by the appellants, the necessary corollary is that the outsider and his broker also deal as principals, and the broker must be answerable to his customer for the execution of all contracts. To put the case concretely, suppose that the situation had been reversed and that the defendants had suspended; would Lathrop, Haskins & Co. have been bound to take the stock and pay the purchase price? If so, the rules would have the merit of consistency, and I am not sure but that in the long run they would be to the advantage of the outsiders, who would then be concerned only with the solvency of the broker selected by them; but the difficulty is that the corollary to the defendants' position is opposed to settled law and to the facts of this case. It is settled in this State by controlling authority that the outsider and his broker deal as principal and agent (*Leo McCormack*, 186 N. Y. 330), and it is established as a fact in this case that the plaintiff's assignor and Lathrop, Haskins & Co. dealt as principal and agent. In the notice of sale the latter said:

"We have sold this day for your account and risk." (italics mine)

"Amount."	Security.	Price.	Of Whom Bought or Sold?"
"25. Hocking Coal & Iron. 83 $\frac{1}{2}$ De Coppet & Dor."			

Mr. Justice GREENBAUM at Trial Term took the view that the rules with respect to the closing of contracts in case of the insolvency of a broker were mere domestic regulations, having no effect upon the rights of outsiders. That view is strongly supported by the English authorities cited by him. It is unnecessary for me to add anything to his discussion of them.

App. Div.]

First Department, March, 1912.

The learned counsel for the appellants urges that the rules of the London Stock Exchange differ from those involved in this case in that the former contemplate an artificial liquidation, whereas under the latter the closing is to be effected by actual purchases and sales. It is sufficient to say on that head that, in so far as the contract involved in this case is concerned, the closing was in every respect as artificial as that provided by the rules of the London Stock Exchange, the only difference being that in this case the balance struck was paid to the receiver of the insolvent, whereas under those rules it would have been paid to an official assignee. I shall not paraphrase what Mr. Justice GREENBAUM has well said on that aspect of the case, but shall consider it from a different standpoint.

The rules of the Stock Exchange are to be construed with a view to their purpose. The first article is illuminating. I quote:

“The title of this association shall be the ‘New York Stock Exchange.’

“Its object shall be to furnish exchange rooms and other facilities for the convenient transaction of their business by its members *as brokers*” (italics mine).

Of course, it is the law that one who employs another as agent to deal in a particular market is bound by the rules of that market, whether he knows them or not, but that rule has its limitations, which are suggested by every one of the decisions cited in support of it. One of those limitations is that, to be binding on outsiders, the rule must be reasonable and must not change in any essential particular the character of the undertaking. (*Harker v. Edwards*, [1887] 57 L. J. [N. S.] 147; *Skiff v. Stoddard*, 63 Conn. 198; *Bibb v. Allen*, 149 U. S. 481; *Lawrence v. Maxwell*, 53 N. Y. 19.) There is more in this case than even an attempt to change the intrinsic character of the undertaking. Lathrop, Haskins & Co. as agents for the plaintiff's assignor contracted to sell twenty-five shares of stock to the defendants. By an artificial liquidation that contract was canceled and the outsider has nothing in its place. He cannot look to the estate of the insolvent for the performance of his contract or for damages as for its breach, for the insolvent agreed to act only as agent, and carefully guarded

First Department, March, 1912.

[Vol. 149.]

against personal responsibility to him by selling for his "account and risk." He did not make a wager on the decline in the market price of the stock. If he had he might complain, but not in a court of law, because his winnings had been turned over to another. He still has his stock, whereas he contracted to sell it; and any rule which deprives him of his bargain without at least substituting another in its place is not binding upon him for the reason that it not only changes the intrinsic character of the undertaking, but as to him annuls it. The suggestion that it would be harsh and unreasonable to require members of the Stock Exchange to recognize the contract rights of outsiders entirely overlooks the fact that such members deal in a market established for the very purpose of enabling them to deal as *brokers*, and, hence, for outsiders. They, therefore, cannot make rules, or construe those already made, so as to destroy the rights of their principals. As I have already indicated, it would not be difficult to close the contracts of an insolvent broker by substituting other contracts at current prices in such a way as to protect the rights of both brokers and outsiders. In the last analysis the question really is whether the undisclosed principal may overtake a contract made for him in the Stock Exchange. The proposition is not open to discussion, at least in this court, that there is privity of contract between the outsider and those with whom his broker deals. (*Leo v. McCormack, supra*; *Clews v. Jamieson*, 182 U. S. 461; *Richardson v. Shaw*, 209 id. 365; *Humphrey v. Lucas*, 2 Car. & K. 151.)

There is nothing in our recent decision in *Springs v. James* (137 App. Div. 110; affd., 202 N. Y. 603) opposed to the foregoing views. That was an action by a cotton broker to recover money expended for his customer, the defense being that the plaintiff's dealings in the New York Cotton Exchange were gambling transactions. The validity of the clearing house rules, providing for the so-called ring settlement was involved. Those rules were sustained upon the theory that the contracts were made in contemplation of actual delivery, that setoff was equivalent to payment or delivery, and that there were always in existence contracts upon which delivery could be made or required. While it might be difficult at a precise moment in the

App. Div.]

First Department, March, 1912.

ringing-out process, as must be the case in the practical operation of any clearing house rule, to put one's finger on the particular contract to which a given customer would be entitled, there was always a contract for the customer in case he demanded or wished to make actual delivery. The customer, who only knew his broker, was so far bound by the rules that he could not insist upon a particular contract. Mr. Justice CLARKE, who wrote for the court in that case, cited, among others, the case of *Clews v. Jamieson (supra)*, in which the court held that there was privity of contract between the outsider and a substituted purchaser under the clearing house rule, although the contract of such purchaser was one to buy more shares than had been contracted to be sold for said outsider. Plainly, then, there was privity of contract between the plaintiff's assignor and the defendants. I think none of us entertains any doubt but that, if the price of the stock had risen, he would have been called upon to make delivery. It happened to decline; but still I think he was entitled to his bargain, and, therefore, vote to affirm the judgment.

Judgment reversed, new trial ordered, costs to appellants to abide event.

THE CITY OF NEW YORK, Respondent, *v.* GILBERT H. MONTAGUE, as Receiver of FULTON STREET RAILROAD COMPANY and Others, Defendants, Impleaded with ADRIAN H. JOLINE and DOUGLAS ROBINSON, as Receivers of the METROPOLITAN STREET RAILWAY COMPANY, Respondents, and ALEXANDER SMITH COCHRAN and WILLIAM F. COCHRAN, JR., as Surviving Trustees under the Will of WILLIAM F. COCHRAN, Deceased, and Others, Appellants. (Appeal No. 2.)

First Department, March 8, 1912.

Appeal — motion for leave to renew motion on additional papers.

An application for a reargument and for a rehearing of a former application for leave to reinstate portions of an answer on additional papers is in effect a motion for leave to renew the motion on additional papers and is appealable.

First Department, March, 1912.

[Vol. 149.]

APPEAL by the defendants, Alexander Smith Cochran and another, as surviving trustees, etc., and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of January, 1912, denying the said defendants' motion to vacate an order entered in said clerk's office on the 17th day of November, 1911, and to reinstate part of the amended answer of certain of the appellants, and also denying a stay of proceedings.

Edgar J. Kohler [*Alfred A. Gardner* with him on the brief], for the appellants.

Alfred Ely, Jr. [*Arthur H. Masten, William M. Coleman* and *Frederick W. Kobbe* with him on the brief], for the defendants, respondents.

Terence Farley, for the plaintiff, respondent.

PER CURIAM:

The application was, in form, both for a reargument and for a rehearing of the former application on additional papers, but was, in effect, a motion for leave to renew the motion on additional papers, and was, therefore, appealable. (*Conlen v. Rizer*, 109 App. Div. 537; *Seletsky v. Third Ave. R. R. Co.*, 44 id. 632.) The additional papers do not materially change the record. The motion was, therefore, properly denied and the order should be affirmed; but since the record is substantially the same and the material questions are the same as those presented by the other record on the appeal of these appellants from the original order (*City of New York v. Montague*, No. 1, 149 App. Div. 475), which was argued and is to be decided herewith, the order should be affirmed, without costs.

Present—CLARKE, McLAUGHLIN, LAUGHLIN, SCOTT and DOWLING, JJ.

Order affirmed, without costs.

LORD AND TAYLOR, Respondent, *v.* EDWARD HATCH, Appellant.

First Department, March 8, 1912.

Pleading — amendment of answer — defenses not available against complaint as drawn — costs.

Where a complaint on an account stated alleged a written statement of account and a promise in writing to pay the same, but the proof at trial showed an account stated by implication resting on parol evidence rather than by express agreement, the defendant should be allowed to amend his answer so as to plead the Statute of Limitations, the Statute of Frauds and a discharge in bankruptcy prior to the statement of account, these defenses not being available as against the complaint as drawn.

On granting the amendment under the circumstances aforesaid the defendant should not be required to pay full costs to the date of the application; only motion costs should be imposed.

APPEAL by the defendant, Edward Hatch, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of December, 1911, denying the defendant's motion to amend the answer.

George Zabriskie, for the appellant.

Chester A. Jayne, for the respondent.

PER CURIAM :

The action is on an account stated to recover upwards of \$100,000. The issues herein were referred to a referee to hear, try and determine on the 10th day of June, 1911. At the close of the plaintiff's case a motion to dismiss the complaint was made and denied. The defendant then moved to amend the answer by pleading the Statute of Limitations, the Statute of Frauds and a discharge in bankruptcy. The motion was denied by the referee, evidently on the ground that it should be made at Special Term. The motion was then promptly made at Special Term for the same relief. The defendant has not been guilty of laches. His counsel claims to have been misled, by the form of the complaint, into refraining from leading these defenses.

It is alleged in the complaint that the account was stated between the plaintiff and the defendant on the 25th day of February, 1910 — a copy was annexed to the complaint — and that the defendant then and there promised and agreed in writing to pay the plaintiff the balance owing, as shown thereby. Upon the trial evidence was received, over objection and exception taken on behalf of appellant, tending to show an account stated by *implication* resting on *parol evidence*, and not by *express agreement*. Counsel for appellant claims that if the cause of action had been alleged in accordance with this evidence he could have pleaded the Statute of Limitations, which had run against many of the items, but which was not available against an express promise in writing to pay the indebtedness (see *Delabarre v. McAlpin*, 101 App. Div. 468), the Statute of Frauds and a discharge in bankruptcy prior to the time it is alleged in the complaint that the express promise in writing was made to pay the account. It is manifest, therefore, that the motion should have been granted. Ordinarily where a party wishes to amend his pleading by inserting new causes of action, or defenses, or counterclaims, he should be required to pay the full costs of the action to the date of the application; but in the circumstances here presented it is evident that with respect to some, if not all of these defenses, the appellant was precluded from pleading them, owing to the manner in which the plaintiff alleged his cause of action, and for this reason only motion costs should be imposed.

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion granted.

Present—CLARKE, McLAUGHLIN, LAUGHLIN, SCOTT and DOWLING, JJ.

Order reversed, with ten dollars costs and disbursements, and motion granted.

SAMUEL KRIDEL and ALEXANDER H. KRIDEL, as Executors, etc., of ABRAHAM M. KRIDEL, Deceased, Appellants, *v.* EMANUEL W. BLOOMINGDALE, Respondent.

First Department, March 8, 1912.

Contract — agreement to receive and carry stock — evidence.

Action to recover a sum alleged to have been expended by plaintiffs' testator for the defendant under an agreement to receive and carry for the defendant certain shares of stock. Evidence examined, and held, that plaintiffs established a *prima facie* case and that the court erred in dismissing the complaint.

APPEAL by the plaintiffs, Samuel Kridel and another, as executors, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 21st day of November, 1911, upon the dismissal of the complaint by direction of the court at the close of plaintiffs' case on a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 15th day of November, 1911, directing the dismissal of the complaint.

Barnett L. Hollander, for the appellants.

William F. Goldbeck [Edward D. Brown with him on the brief], for the respondent.

LAUGHLIN, J.:

The action is brought to recover the sum of \$24,000, alleged to have been expended by the plaintiffs' testator for the defendant under an agreement by which he undertook to receive and carry for the defendant 200 shares of the preferred stock of the Hudson Companies, a domestic corporation. It is alleged that the stock was received by the decedent and carried for the account of the defendant pursuant to the agreement from the 20th day of February, 1906, until the 19th day of July, 1911, and was then duly tendered to the defendant, who refused to pay said amount advanced thereon and to accept the stock; and that the tender has been kept good; and judgment is demanded for the amount so expended, together with interest

First Department, March, 1912.

[Vol. 149.]

thereon. The defendant admitted that on or about the 20th day of February, 1906, the testator received 200 shares of the preferred stock of the Hudson Companies, and that on or about the 19th day of July, 1911, plaintiffs tendered to defendant 200 shares of the stock of said companies and demanded payment of the sum of \$24,000, claimed to have been advanced thereon by the testator and by them for the account of the defendant and that he refused to make the payment and to accept the stock. Upon the trial the plaintiffs showed that on the 20th day of February, 1906, the defendant received a check to his order from the firm of J. Kridel Sons & Co., of the same date, for the amount of \$28,750, which he cashed, and drew a check to the order of the firm of Harvey Fisk & Sons, bankers, for the same amount, and received therefor 500 shares of the stock of the Hudson Companies and delivered the same to the testator, who on the 15th day of August, 1907, paid a twenty-five per cent call on the stock, aggregating the sum of \$12,500, and a like amount on the 4th day of November, 1907, as a final call on the stock together with the sum of \$150, interest thereon, and on the trial the plaintiffs tendered 200 of the 500 shares of stock to the defendant, which the defendant declined. The agreement under which this stock was delivered to the testator, and under which he held it was shown by a letter written by defendant to the testator on the 20th day of February, 1906, which states that it was understood that of the said 500 shares of the Hudson Companies stock, indorsed by defendant in blank and delivered to the testator, one-half of the purchase price of which had been paid, the testator was carrying 200 shares for the account and risk of the defendant, and the balance for his own account and risk, "accounting to be made when transaction is closed," and the testator was therein requested to let defendant know if that was in accordance with his understanding; and a letter from the testator to defendant the next day stating that it was understood that of the 500 shares of the Hudson Companies stock delivered to him, 200 shares belonged to the account and risk of the defendant, and that the balance belonged to the testator, and "that at the time of selling, the accounting will be made by you, with interest added." The plaintiffs thereupon rested, and

App. Div.] First Department, March, 1912.

on motion of counsel for the defendant, their complaint was dismissed for inadequacy of proof.

The learned counsel for the defendant contends that there was no liability on the part of the defendant, for the reason that it was neither alleged nor shown that the stock had been sold. We are of opinion that this contention cannot prevail. There was no obligation on the part of the plaintiffs' testator to carry the stock indefinitely. The contract did not prescribe a period within which the stock should be sold, or the terms on which the sale should be made. The stock was carried by plaintiffs' testator and by the plaintiffs for a period of more than five years, and, therefore, a reasonable time had elapsed before the tender, and it became the duty of the defendant to accept his share of the stock and to pay his proportionate share of the carrying charges. The plaintiffs, therefore, established a *prima facie* case and the court erred in dismissing the complaint.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellants to abide the event.

INGRAHAM, P. J., McLAUGHLIN, MILLER and DOWLING, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellants to abide event.

SAMUEL NATOWITZ, Respondent, *v.* INDEPENDENT ORDER AHAWAS ISRAEL, Appellant.

First Department, March 8, 1912.

Interpleader—separate actions by widow and son to recover benefit from fraternal organization.

Where a widow and a son of a deceased member of a fraternal organization obligated to pay a death benefit to the person entitled thereto bring separate actions to compel the payment of such benefit, the defendant organization, admitting its liability but being honestly in doubt as to which plaintiff to make the payment, is entitled to an order of interpleader under section 820 of the Code of Civil Procedure.

APPEAL by the defendant, Independent Order Ahawas Israel, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of December, 1911, denying the defendant's motion of interpleader.

Alfred B. Jaworower, for the appellant.

Isaac Siegmeister, for the respondent.

MC LAUGHLIN, J.:

One Joseph N. Natowitz, who died on the 10th of June, 1911, was at and for some time prior to his death a member of the defendant. Under its constitution the defendant, a fraternal organization, pays a death benefit or endowment of \$500 upon the death of a member to the person or persons entitled to receive the same. The plaintiff, a son, has brought this action to compel the payment of this amount to him on the ground that he is entitled to receive it. The widow of the deceased member has commenced an action against the defendant in the Municipal Court of the city of New York to recover the same sum on the theory that she is entitled to it. The defendant admits its liability to pay the \$500 but is in doubt to which one to make the payment. Before answering, the defendant made a motion to interplead the plaintiff in the Municipal Court action and substitute her in its place in this action, and upon paying said sum into court that the Municipal Court action be stayed and it be relieved from all liability. The motion was denied and it appeals from the order.

I think the motion should have been granted. The widow and son both claim to be entitled to recover the same fund. Defendant concedes its liability to one or the other and is willing to discharge it. It is not liable to both. No good reason is suggested why the widow and son should not litigate between themselves as to their respective rights, or why the defendant should be put to the trouble and expense of carrying on litigation, the ultimate purpose of which is to settle such rights.

The facts set out in the papers used upon the motion bring the case squarely within the provisions of section 820 of the

App. Div.]

First Department, March, 1912.

Code of Civil Procedure, which provides that where an action has been brought to recover upon a contract a defendant, at any time before answer, on proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property, without collusion with him, may apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place and to discharge him from liability to either, on his paying into court the amount of the debt. There is nothing to indicate that the defendant, in making the motion, did not act in entire good faith or that it is in any way in collusion with the plaintiff. *Pouch v. Prudential Ins. Co.* (146 App. Div. 612) and *St. John v. Union Mutual Life Ins. Co.* (132 id. 515) are directly in point.

The order appealed from, therefore, should be reversed, with ten dollars costs and disbursements, and the motion granted, without costs.

CLARKE, LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, without costs.

HERBERT I. HALL, Respondent, *v.* FRENCH-AMERICAN WINE COMPANY, Appellant.

First Department, March 15, 1912.

Principal and agent — sale defined — factor and broker distinguished — action by factor for damages resulting from discharge — construction of contract — when agent entitled to commissions.

A sale is a contract for the transfer of property from one person to another for a valuable consideration. The thing sold must have an actual or potential existence, and be specific or identified and capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement.

A party under contract to secure orders for and deliver wine in certain territory — delivery being essential to entitle him to his commissions — is a factor, and not a broker, within the ordinary meaning of the terms, and orders taken by him and accepted by his principal, but not filled, are executory agreements and not sales.

Thus, such a factor, in an action for damages because of his discharge, cannot recover commissions on the unfilled orders.

First Department, March, 1912.

[Vol. 149.]

The practical construction given a contract by the parties themselves is of great importance in determining their meaning.

An agent earns his commission when his work is done; if he is a mere broker, when he produces an acceptable customer; if a factor, an agent to obtain and fill orders, when he has made delivery.

APPEAL by the defendant, the French-American Wine Company, from a judgment of the Supreme Court in *favor of the plaintiff*, entered in the office of the clerk of the county of New York on the 17th day of February, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 9th day of March, 1911, denying the defendant's motion for a new trial made upon the minutes.

Warren Bigelow, for the appellant.

Frederic R. Kellogg, for the respondent.

MILLER, J.:

On the 25th of August, 1908, the plaintiff and the defendant entered into a written contract, whereby the latter agreed to act as its sole agent for the sale of wines and spirits in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey and the District of Columbia. The plaintiff agreed to receive \$1 a barrel on all sales made either by him or by the defendant directly within that territory, and he agreed to assist in the sale of the defendant's products in every way possible to extend its business and protect its interests to his utmost ability. He was to make prompt remittances, and to account for all money and property in his hands belonging to it. He was to give a bond in the sum of \$5,000 for the faithful performance of his duty, and it was agreed that the contract should remain in force for one year, and that "if in that time the sales in the United States shall aggregate four thousand barrels, (4,000) from the date hereof, it is to be continued for four (4) years in addition, or until August 25, 1913." On the 25th of August, 1909, the defendant discharged the plaintiff, and this action is to recover damages therefor. One of the questions in dispute was whether the sales in plaintiff's territory amounted to 4,000 barrels. It was admitted that 3,436 barrels were actually delivered.

App. Div.]First Department, March, 1912.

orders taken by the plaintiff, and that the defendant sold directly within that territory 382 barrels, making a total of 3,818 barrels. The plaintiff asserted that he was entitled to credit for a number of unfilled orders, any one of which was sufficient to supply the shortage, viz., an order for 480 barrels procured from one Lupo, upon which 250 barrels remained undelivered; an order for 400 barrels procured from one Valenza, upon which 234 barrels were undelivered; an unfilled order obtained from one Conte for 180 barrels, to be computed with any one of a number of small unfilled orders, and an order for 500 barrels obtained from the Independent Wine Company. The Lupo order was not filled for the reason that Lupo failed and absconded. The Valenza order contained this provision: "Delivery to be made at my option in lots of not less than 25 bbls. at a time, the total quantity to be taken within 6 months, but if there should be a balance at the expiration of 6 months, you will grant me an extension of time." The defendant had previously directed the plaintiff to accept the Valenza order only in case the customer would agree to accept delivery of 40 to 50 barrels weekly. The Conte order was not included in the plaintiff's bill of particulars. It appears that the plaintiff had sold and delivered a quantity of wine to Conte, and, a dispute having arisen, had made him certain allowances, and had written the defendant, saying that those allowances had been made for the purpose of getting an order from him for 180 barrels. No such order, however, was ever submitted by the plaintiff. The plaintiff testified that the Valenza and Conte orders were not filled because the wine in his possession turned sour; but there is no claim that he ever requested defendant to furnish additional wine with which to fill those orders. It is unnecessary to consider separately the small orders, as it is not claimed that their aggregate amount is sufficient to make up the deficiency of 182 barrels. While the plaintiff claimed to have obtained an order for 500 barrels from the Independent Wine Company, no such order was ever submitted to the defendant, and an officer of that company, though not the one with whom the plaintiff claimed to have made the arrangement, testified that it was not in a position to give such an order, and that it had not

First Department, March, 1912.

[Vol. 149.]

given one to his knowledge. The plaintiff did not even inform the defendant who his customer was, but on August 24, 1909, wrote the defendant's representative, saying that he had received an order for 500 barrels of claret, deliveries to be made at a minimum rate of 100 barrels a month, the terms of sale to be, according to the plaintiff's testimony, "24½c per gallon F. O. B. cars California. Cash on arrival." The said representative testified that the letter, when delivered to him, read "F. O. B. dock New York." He indorsed on the back of the letter a refusal to accept on the ground that the price was too low and returned it to the plaintiff. All of the foregoing alleged orders were submitted to the jury, with the instruction: "If this man Hall, under this contract, sold wines, he performed his duty if he obtained, in good faith, orders for wines or brandies from purchasers within his territory, upon the terms authorized or accepted by the defendant; so that if he got these customers whose wines were undelivered, made a contract to sell wines to them within the terms which he was authorized by the defendant to make, if the terms of his sales to these parties were authorized or were accepted by the defendant he is entitled to his commissions upon those sales whether the goods were afterwards delivered or not." The exception to that charge presents the question whether an order accepted by the defendant was a sale within the meaning of that contract.

There can be no doubt that in law, and even in common acceptance, a sale of merchandise involves the transfer of title, and that an executory agreement to sell is not a sale. The word "sale" is thus defined by the text writers: "Sale, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value." (1 Shars. Black. 446.) "By the common law a sale of personal property is usually termed 'a bargain and sale of goods.' It may be defined to be a transfer of the absolute or general property in a thing for a price in money." (Benj. Sales [7th ed.], 1.) "A sale is a transfer of the absolute title to property for a certain agreed price." (Story Sales, 1.) "A sale of personal property is the transfer, in pursuance of a valid agreement, from one party, called the seller, to another, called the buyer, of the general or absolute title to a specific chattel for a price or a consid-

App. Div.] First Department, March, 1912.

eration estimated in money." (1 Mechem Sales, 3.) Kent says "Of the Contract of Sale" that "A sale is a contract for the transfer of property from one person to another, for a valuable consideration * * *. The thing sold must have an actual or potential existence, and be specific or identified, and capable of delivery, otherwise it is not strictly a contract of sale, but a *special* or *executory agreement*." (2 Kent's Comm. [14th ed.] #468.) According to Kent's definition the orders in this case were special or executory agreements, not contracts of sale.

The plaintiff, however, contends that a broker to sell earns his commission when an enforceable contract is made and that, as the plaintiff was merely employed as a broker, the word "sales" should be construed to include an executory contract. It is true that one employed merely as a go-between has performed his work and earned his commission when he has produced a purchaser acceptable to his principal. The familiar cases mostly relating to sales of real estate need not be cited. I do not say that a different rule applies to an agency to sell real estate from that applicable to one to sell personal property. But there is a distinction between an executory contract of purchase and sale of real property and an accepted order for a quantity of unidentified personal property. In the former case there is a transfer of the equitable title — hence, a sale; in the latter case there is no sale but only an executory agreement.

The plaintiff was to have commission on his own sales and on those directly made by the defendant within his territory, his agency was exclusive, and all sales made were to be counted in making up the total number, which was to be the test of his efficiency. If the Lupo order had been sent to the defendant directly without the plaintiff's intervention it would certainly not be claimed that the 250 barrels undelivered were sold within the meaning of the contract so as to entitle the plaintiff to his commission and to the right to count them in making up the 4,000 barrels. And yet if there was a sale in one case there would be in the other. The contract makes no distinction between sales made by the plaintiff and those made by the defendant.

The plaintiff was not employed simply as a broker, a mere go-between. While the contract does not specify his duties,

First Department, March, 1912.

[Vol. 149.]

it plainly shows that the parties contemplated that he would do more than obtain orders. As a matter of fact, consignments were made directly to him, and from them he himself made deliveries to fill his orders, rendering accounts thereof to his employer. After the contract was terminated he wrote to the defendant, saying: "I shall retain under my factor's lien all property now in my possession belonging to the French-American Wine Co." He was in truth what he claimed to be, a factor. His work in a given case was not done when an order was obtained, because he still had to make delivery. Delivery then was essential to entitle him to a commission.

The practical construction given a contract by the parties themselves is always of great importance in determining its meaning. Throughout the entire year of the contract the plaintiff rendered statements in which he charged commissions only for wine actually delivered. The effect of his act, as a practical construction of the contract, is somewhat weakened by the fact that on the 26th of January, 1909, in a letter to the defendant he said "* * * it was understood by me that the brokerage was to be paid when the order was accepted as customary and usual." And in a letter of January 6, 1908, he had said: "It is the custom of the trade as well as the usual method of doing business in all lines that when the broker has effected a sale and the credits and terms are satisfactory to the seller, that he has completed his part of the transaction and has earned his brokerage." Those statements, however, were made in reference to the claims of sub-agents employed by him, who were strictly brokers, mere go-betweens, to find customers, and while he made those statements he never in fact asserted a claim for commissions on unfilled orders until after his discharge. We think, therefore, that the word "sales" as used in the contract should be construed according to its ordinary and legal acceptance, and not in the limited sense in which it is sometimes used with reference to contracts of brokers, employed merely to find purchasers, with whom the principal deals directly.

While we find no case in this State directly in point, our attention has been called to three in other jurisdictions which support the conclusion reached by us. (*Garnhart v. Renthler*,

App. Div.] First Department, March, 1912.

72 Ill. 535; *Humphries v. Smith*, 5 Ga. App. 340; *Creveling v. Wood*, 95 Penn. St. 152.) It is claimed that the authority of the last case cited is weakened by a later decision in *Restein v. McCadden* (166 Penn. St. 340), but from the report of that case it would appear that the plaintiff was employed strictly as a broker. Perhaps the first case cited is nearest in point. In that case an agent to sell machines was required to deliver and set them up, to start them and remedy any complaint within his power; in other words, he was not a mere broker. In this case the plaintiff was to make deliveries. The point is, that the agent earns his commission when his work is done; if he is a mere broker, when he produces an acceptable customer; if a factor, an agent to obtain and fill orders, when he has made delivery.

If the defendant had prevented the plaintiff from making deliveries a different question would be presented. (See *Wake-man v. Wheeler & Wilson Manufacturing Co.*, 101 N. Y. 205; *Taylor v. Enoch Morgan's Sons Co.*, 124 id. 184.)

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.

CLARKE, McLAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

THE EQUITABLE TRUST COMPANY OF NEW YORK, Appellant,
v. SAMUEL H. MOSS, Respondent.

First Department, March 15, 1912.

Insurance—life insurance taken out by infant—request to third party to pay premium—action against infant on promise to repay—failure to show that premium was advanced.

As section 55 of the Insurance Law makes an infant over fifteen years of age competent to contract for life insurance on his own life for his benefit or for that of certain specified relatives, a person who has paid the premium for the infant at his request can recover the amount from the infant the same as he might recover for necessaries furnished. But where the infant made a written request to a third person to pay the premium and has in writing agreed to repay the amount advanced, the third party or his assignee cannot recover on the written instrument

itself without alleging and proving that he paid the premium. The request itself is not a contract binding on the infant, but merely evidence which might support an action to recover insurance premiums paid at the request of the infant.

APPEAL by the plaintiff, The Equitable Trust Company of New York, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 29th day of June, 1911, affirming a judgment of the Municipal Court of the city of New York in favor of the defendant, entered upon the decision of the court dismissing the complaint.

Herbert G. McLear, for the appellant.

Gustav Goodmann, for the respondent.

MILLER, J.:

The defendant, who was nineteen years of age at the time, applied to the Equitable Life Assurance Society for a policy of insurance on his life for the benefit of his mother, and, in consideration of the policy received by him, signed and delivered to Archibald C. Haynes, the general agent of the insurance society, the following paper:

“**Mr. ARCHIBALD C. HAYNES,**

“No. 25 Broad Street, N. Y.:

“**DEAR SIR.—**I hereby acknowledge having received from Mr. Robert D. Sullivan policy No. 2,043,089, being for \$2,500.00 on my life in the Equitable Life Assurance Society. You are authorized and requested to pay the amount of the first premium for me upon said policy in order to place the same in force from this date, and I promise to pay to you or to your order the amount so advanced, to wit, \$35.43, as follows: On August 26, 1905.

“And I hereby acknowledge and declare that this premium, with interest in advance on all deferred payments, has been settled in full in conformity with and in no way contrary to the laws of the State of New York, and that there is no written or verbal agreement of any kind to release me from the above obligation or any part thereof.

“Very truly yours,

“**SAMUEL H. MOSS.**”

App. Div.]First Department, March, 1912.

This action is brought by the plaintiff as assignee of Haynes, and the defense is infancy.

Section 55 of the Insurance Law, in force when the instrument in suit was made (Laws of 1892, chap. 690, as amd. by Laws of 1902, chap. 437), provided as follows: "In respect of insurance heretofore or hereafter, by any person not of the full age of twenty-one years but of the age of fifteen years or upwards, effected upon the life of such minor, for the benefit of such minor or for the benefit of the father, mother, husband, wife, brother or sister of such minor, the assured shall not, by reason only of such minority, be deemed incompetent to contract for such insurance, or for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract." This court in the Third Department has held that a contract within section 55 of the Insurance Law is binding, and that the minor cannot rescind and recover back premiums paid. (*Hamm v. Prudential Insurance Co.*, 137 App. Div. 504.)

The statute in express terms provides that the assured shall not by reason of minority "be deemed incompetent to contract for such insurance." His contract, therefore, with the insurance company was enforceable, and he thereby incurred the obligation to pay the premium. I am unable to perceive how there can be any distinction between such a contract and one for necessaries. By the rules of the common law an infant was not under a disability to contract for necessities. Now, by the express rule of the statute, he is not under a disability to contract for insurance for the benefit of himself or certain classes of beneficiaries.

One who has paid money at the request of an infant to satisfy a debt contracted by the latter for necessities may recover from the infant the money paid. (*Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Den. 460.) It can make no difference to the defendant who his creditor is. Indeed, it might be to his advantage to find some one who would discharge his obligation and trust him for the sum advanced.

I entertain no doubt that, if Haynes had paid the premium at the defendant's request, he or his assignee could maintain an action to recover the sum thus paid. But the difficulty is

First Department, March, 1912.

[Vol. 149.]

that a recovery in this case was not sought on that theory. Instead, the suit is strictly on the contract made with Haynes individually to pay him a sum stated in consideration of his implied promise to pay that sum to the insurance company. The plaintiff neither alleged nor attempted to prove the payment of the premium by Haynes, but both in pleading and proof sought to recover strictly upon the contract with him, whereas it was not a binding contract but at the best was only evidence in support of an action to recover money paid at the request of the defendant to discharge a valid obligation incurred by him.

The determination should be affirmed, with costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and CLARKE, JJ., concurred.

Determination affirmed, with costs.

In the Matter of Acquiring Title to an UNNAMED STREET Running Parallel to Broadway about Two Hundred Feet Westerly Therefrom, Commencing at West One Hundred and Eighty-first Street and Ending on the Westerly Side of Broadway, Borough of Manhattan, City of New York.

In the Matter of the Application of WILLIAM H. FISCHER and Others, as Executors of and Trustees under the Will of BENEDICKT FISCHER, Deceased, for an Order or Mandate in Conformity with Section 1001 of Greater New York Charter.

WILLIAM H. FISCHER and Others, as Executors and Trustees, etc., Respondents; THE COMPTROLLER OF THE CITY OF NEW YORK, Appellant.

First Department, March 8, 1912.

New York city — street opening — section 1007, Greater New York charter, construed — assessment against and award to same party — offset — interest on award.

Section 1007 of the Greater New York charter, as to the award of damages and benefits resulting from the opening of streets, specifically confers upon the landowner the right to extinguish, without interest, an assessment for benefits to the extent that an award has been made for dam-

App. Div.] First Department, March, 1912.

ages. It contemplates that there shall be, without action upon the part of the landowner, an application of the award for damages towards the payment of the assessment for benefits, and that this application shall be made as of the date when the assessment becomes payable; that one shall be offset against the other.

Hence, where an assessment for benefits to a landowner is in excess of an award to him for damages, he is not entitled to interest on the award after the assessment for benefits becomes payable.

The fact that a landowner, after the refusal of the comptroller to comply with his demand as to the payment of interest on his award after his assessment for benefits became payable, voluntarily paid the entire assessment for benefits, does not change the relation of the parties.

APPEAL by the Comptroller of the City of New York from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of January, 1912, resettling an order entered in said clerk's office on the 16th day of November, 1911, granting a peremptory writ of mandamus.

Joel J. Squier, for the appellant.

Benjamin Trapnell, for the respondents.

MC LAUGHLIN, J.:

The city of New York, in the above proceeding, acquired title on June 1, 1906, to certain lands for street purposes, and on October 5, 1910, the commissioners of estimate and assessment filed their report, which awarded the respondents \$21,300 as damages for land taken, and \$5,552.20, the interest thereon from the date the title vested in the city to the date of the report, amounting in all to \$26,852.20. An assessment was imposed of \$37,260.72 for benefits upon other lands of the respondents lying contiguous to that taken. On January 5, 1911, the report was confirmed by an order of the Supreme Court, and on January tenth the assessment for benefits became payable. On the thirty-first of January the respondents demanded payment of the award for damages, with interest thereon to date of payment, less liens thereon, by taxes, assessments or incumbrances, and on the eleventh of March following — the award for damages not having been paid in the meantime — they paid the assessment for benefits without interest and without deducting therefrom the award

for damages. A few days later the comptroller offered to pay them the award for damages, with interest to January 10, 1911, the day when the assessment became payable. This they refused to accept, claiming they were entitled to interest to the date of payment. The comptroller declined to pay interest after January tenth, and they thereupon applied to the court for a peremptory writ of mandamus to compel him to pay the amount of the award, together with interest thereon to the date of payment. The application resulted in an order directing that the writ issue, and the comptroller appeals.

The sole question presented is whether the assessment for benefits being in excess of the award for damages the respondents were entitled to interest on the award after the assessment for benefits became payable. The answer to the question turns upon the construction to be put upon section 1007 of the Greater New York charter, which provides that "Whenever an estimate for loss and damage and an assessment for benefit and advantage shall be made by the commissioners of estimate and by the commissioner of assessment, relative to the same person or persons, no interest shall be demanded from such person or persons upon the amount assessed for the benefit and advantage except on the excess of the amount he is to pay over and above the amount he is to receive for or in consequence of any intervening time between the period fixed for the receipt of the amount of benefit and advantage and the payments of the amount of loss and damage." (Laws of 1901, chap. 486, § 1007, as amd. by Laws of 1906, chap. 658.)

This section specifically confers upon the landowner the right to extinguish, without interest, an assessment for benefits to the extent that an award has been made for damages; in other words, the section contemplates that there shall be, without action upon the part of the landowner, an application of the award for damages towards the payment of the assessment for benefits and that this application shall be made as of the date when the assessment becomes payable; that one shall be offset against the other.

In *Matter of City of New York (Church Ave.)* (91 App. Div. 553) the court held that where a demand was served on the comptroller for payment of an award it was insufficient to con-

App. Div.] First Department, March, 1912.

tinue the interest running after the expiration of six months from the confirmation of the report (pursuant to section 1001 of the Greater New York charter) because it did not make allowance for an assessment against the claimant for benefits. The court said that the assessment was "a proper offset against the amount awarded as damages."

This court, in *Matter of Bankers Investing Co.* (141 App. Div. 591), referring to the case just cited, said: "The learned Appellate Division in the Second Department in the case of *Matter of City of N. Y. (Church Ave.)* (*supra*) gave a very liberal interpretation of these statutory provisions in favor of the city by construing the statute as one for offsetting awards against assessments as of the date when the assessment was levied, and thereby limiting the liability of the city to the payment of interest on the balance of the award, if any, from that date. That construction produces a just result and should be accepted."

Matter of Jackson Steinway Co. v. Prendergast (142 App. Div. 905) was affirmed upon the authority of *Matter of Bankers Investing Co.* (*supra*), the court saying: "We intend hereby to decide that the amount of the assessments without interest should be offset against the amount which was due for award on the date when the assessments became payable."

Here the assessment for benefits, amounting to \$37,260.72, became payable on the 10th of January, 1911, and there was then due the respondents as an award for damages, including interest to that time, \$27,237.25, which latter sum, if the foregoing views be correct, should have been and in legal effect was offset against the former. This left due the city on the assessment for benefits \$10,023.47, that is, the excess of the assessment for benefits over the award for damages. The comptroller, therefore, was justified in refusing to pay interest after that time.

Nor do I think the fact that the respondents, after the refusal of the comptroller to comply with their demand as to the payment of interest, voluntarily paid the entire assessment for benefits, in any respect changed the legal relation of the parties. When they paid the assessment they knew the award was deductible therefrom. They could not by a voluntary pay-

First Department, March, 1912.

[Vol. 149.]

ment impose a legal obligation upon the city to pay interest on the award any more than an acceptance of the payment of the assessment by an official of the city could do so. It was an ingenious attempt, inasmuch as the assessment could be paid without interest, to obtain interest on the award, but a legal liability upon a municipal corporation cannot be imposed in this way.

My conclusion, therefore, is that the parties should be placed in precisely the same position that they would have been had the respondents paid their assessment as of the date when it became payable, less the amount of the award, and interest thereon to that time. If this be done, then it follows, the respondents having paid the entire assessment, that the order appealed from should be modified by striking out the provision as to the payment of fifty dollars costs and directing the comptroller to pay the amount of the award, with interest thereon to January 10, 1911, viz., \$27,237.25, and as thus modified the same should be affirmed with ten dollars costs and disbursements to the appellant.

INGRAHAM, P. J., LAUGHLIN, CLARKE and MILLER, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, with ten dollars costs and disbursements to appellant. Order to be settled on notice.

THE ASPHALT PAVING AND CONTRACTING COMPANY, Appellant,
v. THE CITY OF NEW YORK, Respondent. (Action No. 2.)

First Department, March 22, 1912.

Municipal corporations — paving contract construed — notice to contractor to make repairs — condition precedent to liability — sufficiency of notice — action by assignee to recover balance due on paving contract — assignment of claim by officers of corporation after dissolution.

An asphalt paving company contracted with the city of New York to pave certain streets and maintain the pavement in good condition for fifteen years, during which period a portion of the contract price was to be retained by the city and paid to the company in installments at

App. Div.] First Department, March, 1912.

stated periods. It was further provided that, if the company did not repair defects in the pavement within the fifteen-year period upon receiving notice from the commissioner of public works, the city might make the repairs and deduct the same from any sum due. Subsequently the paving company executed a power of attorney to one B., its attorney, who was also manager of the Barber Asphalt Paving Company, authorizing him to receive and receipt for any moneys becoming due under the contract. Thereafter the paving company was voluntarily dissolved, but B. continued to receive the payments from the city. Later the city, claiming that the Barber Asphalt Company was the "assignee or successor in interest under said contracts," served notice upon said company that if it did not make certain repairs, pursuant to the terms of the contract, the city would cause the work to be done at its expense. The work required to be done by this notice was never performed. In an action by the assignee of the paving company to recover the amount which would have been due from the city had the company kept the pavement in repair after receiving notice so to do,

Held, that the giving of notice to make the repairs was a condition precedent to the paving company's liability;

That the notice given directly to the Barber Company was not notice to the paving company, and consequently it was never in default, and its assignee was entitled to recover.

The fact that the notice was served upon the agent in charge of the work did not make it effective, when it did not call upon the paving company to make the repairs, but upon a third party claimed to be under a duty to make them.

The officers of a corporation, being trustees of its assets after a voluntary dissolution, may execute a valid assignment of a claim for moneys due under a contract.

LAUGHLIN, J., dissented.

APPEAL by the plaintiff, The Asphalt Paving and Contracting Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 23d day of November, 1910, upon the verdict of a jury, and also from an order entered in said clerk's office on the 21st day of November, 1910, denying the plaintiff's motion for a new trial made upon the minutes.

L. Laflin Kellogg, for the appellant.

Terence Farley, for the respondent.

DOWLING, J.:

On June 24, 1896, a contract in writing was executed between the mayor, aldermen and commonalty of the city of

First Department, March, 1912.

[Vol. 149.]

New York, parties of the first part, and the Warren-Scharf Asphalt Paving Company, party of the second part, for the regulating and paving with asphalt pavement, on the then existing pavement, of the carriageway of First avenue from Twentieth street to One Hundred and Ninth street (with certain exceptions) in the city of New York. The contractor, in consideration of the price to be paid it for the work, agreed among other things that it would "maintain the said work in good condition, to the satisfaction of the commissioner of public works, his successor or successors, for the period of fifteen years from the final completion and acceptance thereof." Among the provisions of the contract was the following:

"SECURITY TO BE RETAINED FOR REPAIRS.

"14a. And it is further agreed that if, at any time during the period of fifteen years from the date of the acceptance by said Commissioner of the whole work under this agreement, the said work, or any part or parts thereof, in the opinion of said Commissioner, require repairs or sanding, as provided for in Section 8, or the surface of the pavement shall have any cracks, bunches, holes or depressions that shall measure more than $\frac{1}{2}$ inch from the under side of a straight edge 4 feet long laid on the surface, and the said Commissioner shall notify the said party of the second part to make the repairs or do the sanding as required, by a written notice to be served on the contractor either personally or by leaving said notice at his residence or with any of his agents in charge of the work, or employees found on the work, the said party of the second part shall immediately commence and complete the same to the satisfaction of said Commissioner; and in case of failure or neglect on his part so to do within twenty-four hours from the date of the service of the aforesaid notice, then the said Commissioner of Public Works shall have the right to purchase such materials as he shall deem necessary, and to employ such person or persons as he may deem proper, and to undertake and complete the said repairs or sanding, and to pay the expense thereof out of any sum of money due the contractor, or retained by the said party [parties] of the first part as hereinafter mentioned. And the parties of the first part hereby agree upon the expiration of the

App. Div.] First Department, March, 1912.

said period of fifteen years, provided that the said work shall at that time be in good order or as soon thereafter as the said work shall have been put in good order to the satisfaction of the said Commissioner, to pay to the said party of the second part the whole of the sum last aforesaid or such part thereof as may remain after the expenses of making the said repairs in the manner aforesaid shall have been paid therefrom."

The amount withheld by the city to protect itself against default by the contractor in his agreement to keep the work in repair was fixed by the following paragraphs of the contract:

“PAYMENTS WHEN MADE.

“23. And the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work or materials until the same shall be fully completed in the manner set forth in this agreement, and such completion shall be duly certified by the Engineer, Inspector and Water Purveyor in charge of the work and until each and every of the stipulations hereinbefore mentioned are complied with and the work completed to the satisfaction of the Commissioner of Public Works and accepted by him; whereupon the parties of the first part, under Chapter 475, Laws of 1895, will pay and hereby bind themselves and their successors to pay to the said party of the second part in cash on or before the expiration of thirty days from the time of the completion of the work and the acceptance of the same by the Commissioner of Public Works, seventy per cent of the whole of the moneys accruing to the said party of the second part under this agreement, and the balance of the moneys that may be due to said party of the second part under this agreement as follows: Three per cent of the whole amount of money accruing to said party of the second part on the expiration of the sixth year and a like further sum of three per cent at the expiration of each succeeding year thereafter until the whole or as much as may remain due of said contract price shall be paid should the party [parties] of the first part perform the work stipulated under Section (14a) of this agreement.”

The Warren-Scharf Asphalt Paving Company entered upon

the performance of its contract and obtained its final certificate from the appropriate city officials August 30, 1897, from which it appears that the amount retained as security for the making of repairs under the section last quoted was \$90,835.98. The first of the annual payments required by the contract to be made to the contractor on account of this retained percentage became due August 30, 1903, and payments of \$9,083.59 were so made to the contractor on that date, and on August 30, 1904, August 30, 1905, August 30, 1906, and August 30, 1907. On May 10, 1904, the Warren-Scharf Asphalt Paving Company executed its power of attorney in writing to James L. Brusstar, authorizing him to receive and receipt for any and all moneys becoming due to it under the contract in question. Thereafter, the corporation having been organized under the laws of the State of New York, went through the proceedings required by section 57 of the (then) Stock Corporation Law (Gen. Laws, chap. 36 [Laws of 1892, chap. 688], added by Laws of 1896, chap. 932, and amd. by Laws of 1900, chap. 760), and was voluntarily dissolved on June 11, 1904. Brusstar continued to receive the payments from the city on account of the retained percentage, acting as attorney for the corporation. On May 28, 1908, the president of the borough of Manhattan wrote two letters to the Barber Asphalt Paving Company, one of which, that relating to certain paving covered by the maintenance clause in the contracts between the city of New York and the Atlantic Alcatraz Asphalt Company, is in the record on appeal in action No. 1 between the parties to this action, argued herewith (149 App. Div. 632), but the second letter is not in the record on the present appeal. It may be assumed to be similar to the first letter referred to, which was a demand that the Barber Company commence the work of repairing the asphalt pavement, pursuant to the terms of the contracts, within forty-eight hours, in default whereof the city would have the work done at the contractor's expense, the notice being given to the Barber Company as "assignee or successor in interest under said contracts." This assumption is justified by the tenor of the notice given by the city on June 10, 1908, hereinafter quoted. Replying to these two letters, the following letter was sent:

App. Div.]

First Department, March, 1912.

“June 3rd, 1908.

“Hon. JOHN F. AHEARN,

“President of the Borough of Manhattan,

“City Hall, New York City:

“DEAR SIR.— Your two letters of May 28th, 1908, regarding contracts made between the City of New York and the Atlantic Alcatraz Asphalt Company and the contracts made with the Warren-Scharf Asphalt Paving Company, are at hand.

“We beg to advise you that we recognize no liability to the City of New York attempted to be enforced by the said notices.

“Yours very truly,

“BARBER ASPHALT PAVING COMPANY,

“J. L. BRUSSTAR,

“District Manager.”

On June 10, 1908, the city of New York caused the following notice to be given, which was served on James L. Brusstar, described as district manager of the Barber Asphalt Paving Company, being the same person who had previously acted as attorney for the Warren-Scharf Asphalt Paving Company:

“THE CITY OF NEW YORK,

“OFFICE OF THE PRESIDENT OF THE BOROUGH OF

“MANHATTAN, CITY HALL,

“NEW YORK, June 10th, 1908.

“To the BARBER ASPHALT PAVING COMPANY:

“GENTLEMEN.— It has been certified to me by the Engineer of the Bureau of Highways that the asphalt pavement at the location or locations designated herein below is in need of immediate repair.

“Said location or locations are at

“First Avenue from 20th to 26th Street

“ “ “ 35th to 36th Street

“ “ “ 36th to 49th Street

“ “ “ 51st to 54th Street

“ “ “ 56th to 60th Street

“ “ “ 61st to 72nd Street

“ “ “ 74th to 83rd Street

“ “ “ 84th to 85th Street

“ “ “ 86th to 91st Street

“ “ “ 92nd to 109th Street

First Department, March, 1912.

[Vol. 149.]

in the Borough of Manhattan. Each of the locations is covered by the maintenance clause in the contract between the City of New York and the Warren-Scharf Asphalt Paving Company, dated June 24th, 1896, and on file in the office of the comptroller of the City of New York of which last named corporation you are the assignee or successor in interest under said contracts.

"You are, therefore, hereby notified, pursuant to the terms of said contract, to commence within forty-eight (48) hours from the date of the service of this notice, the work of repairing the asphalt pavement at the designated location or locations. Should you fail or neglect to comply with the terms of this notice within the time specified herein, I shall issue an order to another asphalt company to perform the work and the expense thereof will be charged and met in the manner provided by the terms of the said contract for the work described, and action will be brought against you to recover the necessary expense of such work.

JOHN F. AHEARN,

"President, Borough of Manhattan."

With this notice no compliance was ever had, nor was the work thereby required to be done ever performed by the Barber Company, by the contractor or by any one on behalf of either. This action is brought by plaintiff, under an assignment by the Warren-Scharf Asphalt Paving Company to it, dated June 30, 1908, to recover the sum of \$9,083.59, the amount of the retained percentage which the contractor would have been entitled to recover on August 30, 1908, had it complied with the terms of the contract and kept the pavement in repair, after receiving notice so to do. The failure to do so is sought to be justified upon the ground that the notice required to be given to the contractor under the contract was never in fact given, and that, therefore, it never was in default. The learned trial court submitted to the jury as the sole issue for their consideration: "Was the Barber Asphalt Company the agent of the Warren-Scharf Company in charge of the work of repairs under this contract on First Avenue at the time * * * the notice Defendant's Exhibit C was served on the Manager of the Barber Asphalt Company on June 10, 1908?" and in connection therewith charged the jury "that if they find the Barber

App. Div.] First Department, March, 1912.

Company was the agent of that company at that time then this was a sufficient notice to make repairs, and that if it was such a notice [plaintiff is] not entitled to recover in this action." The jury brought in a verdict for defendant. Thereafter, upon a motion for a new trial, the questions involved were discussed by the court in an opinion denying such motion. (69 Misc. Rep. 588.) In our opinion there was sufficient evidence to warrant the finding of the jury that the Barber Company was the agent of the Warren-Scharf Company in charge of the repair work on First avenue. But it is unnecessary to analyze the evidence supporting such finding, for the reason that even granting that fact as proven, the notice itself was insufficient to charge the Warren-Scharf Company with any liability for the failure to make the repairs. It will be remarked that the notice given by the city is not a notice given to the Barber Company as agent, nor to the Warren-Scharf Company as principal. It is a notice given directly to the Barber Company as principal calling upon *it* to do the work of repair, pursuant to the terms of the contract, and that in case of *its* failure to do the work, the city would cause it to be done at *its* expense. Not only is this so, but the city gives this notice to the Barber Company directly because it is claimed to be "the assignee or successor in interest under said contracts." Every part of the notice contradicts any claim that it was given to the agent of the Warren-Scharf Company for the purpose of notifying the latter that it was called upon to do the repairing under the contract. Every part of the notice is consistent with the theory that the city officials thought the Barber Company was the principal with whom they had to deal and acted accordingly. The fact, therefore, that the notice was served upon the agent in charge of the work would not make it effective, when it did not call upon the contractor to make the repairs, but upon a third party whom it claimed to be under a duty to make them. No proper notice, therefore, was ever given which operated to put the contractor in default. Nor does the fact that the city officials were misled into the belief that the Barber Company was actually the assignee, or successor in interest, of the contractor change the situation, for it was unable to prove either the sending or

receipt of the letter claimed to contain the misleading information, and, therefore, could not prove that either the Barber Company or the contractor was responsible for the false impression created. The giving of the notice to make the repairs is a condition precedent to the contractor's liability. (*O'Keeffe v. City of New York*, 173 N. Y. 474; *Mack Paving Co. v. City of New York*, 142 App. Div. 702.) No proper notice having been given, the contractor never became liable for a default in failing to make the repairs.

It is also urged on behalf of defendant that plaintiff cannot recover because the assignment to it was invalid. One of the grounds assigned for the motion to dismiss the complaint upon the trial was "that the plaintiffs have not shown a valid assignment duly executed by an officer having authority to execute same." This ground does not appear to have been urged with much force, and is not referred to in the opinion of the court upon the motion for a new trial. The assignment itself was received in evidence without objection. It recites that in consideration of one dollar and other good and valuable considerations, the receipt whereof is acknowledged, the Warren-Scharf Asphalt Paving Company assigns, transfers and sets over unto the plaintiff all moneys due, or to grow due, as reserved or retained percentage from the city of New York under the contract in question. It contains a further clause authorizing the assignee to take appropriate action to recover the amount in question, and to receipt therefor. It closes: "In witness whereof the Warren-Scharf Asphalt Paving Co. has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed this 30th day of June, 1908," and is signed: "The Warren-Scharf Asphalt Paving Co., by E. R. Riter, Vice President. Attest O. W. Wells, Sec'y. [Corporate Seal.]" It was duly acknowledged before a notary public on behalf of the corporation by E. R. Riter, the vice-president, who deposed as to his official position therein, as to his knowledge of the corporate seal, and that it was the one affixed to the instrument and that "it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order." It is claimed on behalf of defendant that this assignment having

App. Div.]

First Department, March, 1912.

been executed some four years after the voluntary dissolution of the corporation, it is void and transferred no interest whatever to plaintiff. Replying to this plaintiff shows that the assignment is under seal, that it acknowledges the receipt of a good and valuable consideration and that it complies with every requisite to entitle its receipt in evidence. Further, that it shows upon its face that it was executed by the authority of the board of directors of the corporation, who, under the statute, after voluntary dissolution are trustees of its assets and that the life of the corporation is continued to the extent of permitting it, in its corporate name, among other things to collect its assets and doing all things required to wind up its business and affairs. The authority for this is to be found in the General Corporation Law (Consol. Laws, chap. 23 [Laws of 1909, chap. 28], § 221, subd. 3): "Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up." This language is identical with that used in section 57 of the former Stock Corporation Law (Gen. Laws, chap. 36 [Laws of 1892, chap. 688], added by Laws of 1896, chap. 932, and amd. by Laws of 1900, chap. 760). So far is the corporate life maintained even after dissolution that this court has held that in the case of a tort committed against a plaintiff during the lifetime of the corporation, his action therefor, commenced after the voluntary dissolution of the corporation, must be brought against the corporation itself and not against its former directors or trustees. (*Cunningham v. Glauber*, 133 App. Div. 10.) Upon all the facts herein we find no ground on which defendant has successfully attacked the validity of this assignment.

The judgment and order appealed from must, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

INGRAHAM, P. J., McLAUGHLIN and MILLER, JJ., concurred;
LAUGHLIN, J., dissented.

First Department, March, 1912.

[Vol. 149.]

LAUGHLIN, J. (dissenting):

I dissent on the opinion of Mr. Justice FOOTE at Trial Term on motion to set aside the verdict and for a new trial.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

THE ASPHALT PAVING AND CONTRACTING COMPANY, Respondent,
v. THE CITY OF NEW YORK, Appellant. (Action No. 1.)

First Department, March 22, 1912.

See head note in *Asphalt P. & C. Co. v. City of New York, No. 2* (*ante*, p. 622).

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of November, 1910, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 21st day of November, 1910, denying the defendant's motion for a new trial made upon the minutes.

Terence Farley, for the appellant.

L. Laflin Kellogg, for the respondent.

DOWLING, J.:

The judgment and order appealed from will be affirmed, with costs, upon the grounds stated in the opinion in action No. 2, between the same parties (149 App. Div. 622), and upon the further ground that under the amended pleadings in this action defendant claimed that it had given notice to make the repairs in question to the Barber Asphalt Company as assignee of the Warren-Scharf Asphalt Paving Company. It was the defendant's contention that the Barber Company was acting as such assignee, but it utterly failed to sustain its contention by proof, and the verdict was, therefore, properly directed.

App. Div.] First Department, March, 1912.

The judgment and order appealed from are, therefore, affirmed, with costs to respondent.

INGRAHAM, P. J., McLAUGHLIN and MILLER, JJ., concurred.

LAUGHLIN, J. (concurring):

If the city had proceeded with the trial in this action under its original answer, in which it was alleged that the contractor had been duly notified under the contract to make repairs, it would have been entitled to go to the jury on the theory which was adopted in the action by the same plaintiff against the city, known as No. 2, in which a verdict was rendered for the city; but counsel for the city upon the trial applied for and obtained leave to amend the answer by omitting the allegation that the contractor was duly notified and substituting in place thereof an allegation that its *assignee* was duly notified to make repairs. Under the answer as thus amended it was incumbent on the defendant to show that the Barber Asphalt Paving Company was the assignee of the contractor, and in this it failed. The court, therefore, properly directed a verdict in favor of the plaintiff for the amount owing to the contractor.

Judgment and order affirmed, with costs.

THE CITY OF NEW YORK, Appellant, *v.* WARREN-SCHARF ASPHALT PAVING COMPANY and Others, Respondents.

First Department, March 22, 1912.

See head note in *Asphalt P. & C. Co. v. City of New York*, No. 2 (*ante*, p. 622).

APPEAL by the plaintiff, The City of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 8th day of April, 1911, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term as resettled by an order entered in said clerk's office on the 29th day of April, 1911.

Terence Farley, for the appellant.

L. Laflin Kellogg, for the respondents.

DOWLING, J.:

Judgment and order appealed from affirmed, with costs to respondent, on opinion in *Asphalt P. & C. Co. v. City of New York*, No. 2 (149 App. Div. 622).

INGRAHAM, P. J., McLAUGHLIN and MILLER, JJ., concurred; LAUGHLIN, J., dissented. .

LAUGHLIN, J. (dissenting):

This action is brought to recover the cost of repairing asphalt pavement laid in certain public streets by the defendant Warren-Scharf Asphalt Paving Company, pursuant to a contract with the city, by which the said company became obligated, on notice in writing served on it or on its agent in charge of the work, to make all necessary repairs for the period of fifteen years. The other defendants are the sureties for the performance of the contract. The notices are in the same form as the notice quoted in the prevailing opinion in *Asphalt P. & C. Co. v. City of New York*, No. 2 (149 App. Div. 622), the appeal in which was argued and is to be decided herewith. The allegations of the complaint with respect to the service of the notices are to the effect that the defendants, and each of them, were duly notified to make the repairs, and they were served in the month of June, 1908, on James L. Brusstar, who was the district manager for the Barber Asphalt Paving Company, to whom notices to make repairs under the contract had been given since January 1, 1905, when he succeeded one William G. Root, who had been the district manager for the Barber Asphalt Paving Company from December, 1902, until April, 1904, and to whom during that period all notices requiring repairs had been given. The laying of the pavements was completed on the 9th day of September, 1894. Thereafter the contractor ceased to do business, and, as stated in the opinion to which reference has been made, was subsequently formally dissolved; but, under the statutes under which the dissolution took place, it continued in

existence for purposes of liquidation. When the contractor ceased to do business its accredited representative, through whom it had theretofore transacted business in New York, notified the proper officer of the city that the Barber Asphalt Company would, in the future, do the work of repairing the streets under its contracts. Root, while district manager of the Barber Asphalt Paving Company, was also vice-president and superintendent of the contractor, and he testified that he was also the New York director of the contractor during that time and until its dissolution. It appears that when repairs to the pavements laid by the contractor were required to be made, the practice was for the city's representatives to give verbal or written notice to the office of the Barber Asphalt Paving Company, and that in many instances such notices were given over the telephone. The verbal notices were delivered to Root and to his successor, Brusstar, or to one Moller, who was superintendent of the repair department of the Barber Asphalt Paving Company. With respect to the notices by letter it appears by the testimony of Brusstar that he received letters addressed to the contractor, and that he opened them, and that if the letters required repairs under the contract he directed the work to be done, and it was done by the Barber Asphalt Paving Company.

It appears from the opinion of the trial court, expressed on ground that the complaint, that the dismissal was upon the Paving Company instead of to the contractor. I am of opinion that the judgment cannot be sustained on that theory. The contract contained no provision requiring that the notices should be addressed to the contractor, or that they should be fying the at all. It merely required a notice in writing specifying the repairs needed, and it expressly provided that the notice might be left with the contractor's agent in charge of the work. It is quite clear, I think, that the notices were left with the agent of the contractor, as authorized by the contract, for they were left with Brusstar, who was district manager of the Barber Asphalt Paving Company, and who also, according to his testimony, represented the original contractor in the transmission of notices from the city, whether

First Department, March, 1912.

verbally or in writing, concerning repairs required to be made, after the transmission of the notices, in carrying out directions with respect to having the repairs made. Both the Barber Asphalt Paving Company, which he represented, knew perfectly well that if the Barber Asphalt

Company was not the assignee of the original contractor, as the city had been led to believe, these notices were sent, as were all other notices which had been acted upon, to the original contractor, and in these circumstances notice to the principal, who is chargeable with the damage obtained by his agent. (*The Distilled Spirits, 11*)

366, 367; *North River Bank v. Aymar*, 3

v. Farm Buildings Fire Ins. Co., 14 Hun, 6

N. Y. & Sharon Canal Co., 4 Paige, 127.)

does not show that the Barber Asphalt Paving Company was the assignee of the original contractor, altho it is known which led the representatives of the city to believe such was the case, and that accounts for the statement in the notices. It must be assumed, the record, that the only connection of the Barber Asphalt Paving Company with the original contractor was as a

the essential part of the notices was the description of the work required to be done; and in that respect the correctness is not questioned. When the notices were received

Asphalt Paving Company and its district manager knew perfectly well that they related to work required to be performed by the contractor, and on the theory that the Barber Asphalt Paving Company had not succeeded to the obligations of the original contractor as its assignee, Brusstar Asphalt Paving Company likewise knew that the notices were served on the latter company as the agent of the city, and that the city was calling upon whoever was responsible to perform the obligations of the contractor. This satisfactorily shows that the Barber Asphalt Paving Company was the agent of the original contractor and that the contract was never terminated. I am of opinion, therefore, that either the fact that the notices were addressed to the Barber Asphalt Paving Company nor that they erroneously addressed that the Barber Asphalt Paving Company was

First Department, March, 1912.

assignee or successor in interest of the contractor rendered them invalid as notices to the contractor.
I am, therefore, of opinion that the court erred in dismissing the complaint and that the judgment should be reversed.
Judgment and order affirmed, with costs.

In the Matter of the Petition of WILLIAM W. FARLEY, as State Commissioner of Excise of the State of New York, Appellant, for an Order Enjoining JOHN WHALEN, Respondent, from Trafficking in Liquors Contrary to the Provisions of the Liquor Tax Law.

First Department, March 22, 1912.

Intoxicating liquors—junction to restrain traffic in liquors on premises within one year after revocation of certificate—violation of subdivision 8 of section 15 of the Liquor Tax Law.

Where, pending proceedings which resulted in the revocation of a liquor tax certificate on the ground that the premises had been allowed to become disorderly, a liquor tax certificate was issued to another party for the same premises, who designated the place in his application as Liquor Tax Street and number, an injunction under section 28 of the trafficking in Liquors Law, restraining the holder of the latter certificate from Commissioner of Excise. The holder of the latter certificate violated subdivision 8 of section 15 of the Liquor Tax Law, which, as amended by Laws of 1910, chapters 485 and 503, and by Laws of 1911, chapter 643, provides that "no person shall traffic in liquors at said premises for the period of one year from the date of the entry of a final order canceling such certificate." It is unlawful to traffic in liquors, with or without a certificate, for the period of one year from the date when a certificate for such premises has been revoked.

APPEAL by the petitioner, William W. Farley, as State Commissioner of Excise, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of January, 1912, denying the petitioner's motion for an injunction, and also from an order entered in said clerk's office on the 9th day of February, 1912, denying said motion after a reargument.

First Department, March, 1912.

Charles Firestone, for the appellant.

Edward Weiss, for the respondent.

HILLER, J.:

The State Excise Commissioner applied under section 28^u of the Liquor Tax Law (Consol. Laws, chap. 34 [Laws, chap. 39], as amd. by Laws of 1909, chap. 281) for an injunction restraining the respondent from trafficking in liquors contrary to the provisions of said statute at No. 120 West Thirtieth Street, in the borough of Manhattan. A liquor tax certificate issued to one Elise Ruehl for premises Nos. 1384 and 1386 Broadway was revoked by an order of this court on April 17, 1911, on the sole ground that the premises had been suffered to become disorderly. Pending the proceedings for revocation a liquor tax certificate was issued to respondent for said premises at No. 120 West Thirty-eighth street. The petitioner stated on information and belief that the premises described in the application for both of said certificates and where the traffic was carried on, both by said Ruehl and by the respondent, were the same. That statement was supported by evidence on knowledge and was not denied.

The sole question involved on this appeal is whether the proceeding was authorized by said section 28 which, in material, provides: "If any person shall unlawfully traffic in liquor without obtaining a liquor tax certificate, as provided in this chapter, or shall traffic in liquors contrary to any provision of this chapter, the State Commissioner of Excise, his deputy commissioner, or any taxpayer residing in the city, town, village or town, may present a verified petition to the Justice of the Supreme Court or a Special Term of the Superior Court of the judicial district in which such county is situated, or to the County Court or judge of the county in which such traffic in liquors is carried on, for an order enjoining such person from trafficking in liquor thereafter." It might seem at first glance that that section was intended to apply to the case of a trader without a certificate or contrary to the authorization of a particular certificate issued, especially in view of the fact that an injunction may be obtained in and pending a proceeding.

App. Div.]First Department, March, 1912.

for revocation pursuant to section 27 (as amd. by Laws of 1909, chap. 281, and Laws of 1910, chap. 503).

The question, of course, is whether the respondent is trafficking in liquors "contrary to any provision" of the Liquor Tax Law. That question is answered by subdivision 8 of section 15 as amended by chapters 485 and 503 of the Laws of 1910 and chapter 643 of the Laws of 1911. As thus amended the material part provides as follows: "* * *" and if the violation of law for which the cancellation or forfeiture of said certificate was had was that the holder thereof, or his agent, had suffered or permitted said certificated premises, or any yard, booth, garden or any other place appertaining thereto or connected therewith, to become disorderly, or had suffered or permitted any gambling in the place designated by the liquor tax certificate as that in which the traffic in liquors was to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, no new certificate shall be issued for said premises to any person *and no person shall traffic in liquors at said premises* for the period of one year from the date of the entry of a final order canceling such certificate, or from the date of the conviction of the certificate holder or his agent for such crime committed on said premises * * *." (Italics are mine.) The words in italics were added by said amendments of 1910 and were re-enacted by the amendment of 1911 and were evidently intended for just such a case as this. It was, therefore, unlawful to traffic in liquors at said premises with or without a certificate for the period of one year from April 7, 1911, and the case is plainly within said section 28.

As there is no denial of the material facts alleged in the petition the order should be reversed, with ten dollars costs and disbursements, and the prayer of the petition granted, with costs.

INGRAHAM, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements, and prayer of petition granted, with ten dollars costs.

CHARLES F. H. JOHNSON, Appellant, *v.* LEWIS M. ISAACS and HARRY MACK, Defendants, Impleaded with STANLEY M. ISAACS, Respondent.

First Department, March 8, 1912.

Libel — charge of conversion.

It is libelous *per se* to charge that the plaintiff with others received money for the account of another and wrongfully disposed of and converted the same to their own use.

APPEAL by the plaintiff, Charles F. H. Johnson, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of November, 1911, granting the motion of the defendant Stanley M. Isaacs for judgment on the pleadings.

John V. Judge [John T. Fenlon with him on the brief], for the appellant.

Leo G. Rosenblatt, for the respondent.

MILLER, J.:

The only point in this case is whether it is libelous to charge that the plaintiff and others received money for the account of another, and "wrongfully disposed and converted the same to their own use." While it is quite true that a technical conversion may not involve moral turpitude, we think there can be no doubt that the average reader would understand the charge complained of to mean that an agent had appropriated his principal's money to his own use, and it is so plain that such a charge is libelous *per se* that it is idle to examine the cases of technical conversion cited by the respondent.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

DOUGLAS SYMMERS, Suing on His Own Behalf and in Behalf of All Other Persons Similarly Situated Who May Come in and Contribute to the Expenses of This Action, Respondent, *v.* HOWARD CARROLL and HARRIET M. SPRAKER, as Executors, etc., of JOHN H. STARIN, Deceased, Appellants.

First Department, March 15, 1912.

Insurance — insurable interest of owner of vessel — right of owner to recover upon policy — right of owners of cargo to portion of insurance moneys.

The owner or charterer of a steamship has an insurable interest in goods in his possession to the full extent of their value against a loss for which he may become responsible.

The question whether the owner has the right to recover upon such policy is not to be determined after the loss by inquiring whether he is in fact then liable to the owners on account of such loss.

The owner of a steamboat carrying freight took out a policy of insurance indemnifying him against all loss or damage to the vessel or cargo from fire and all other risks and damages incident to the use thereof in certain waters. The insured was described in the policy as "John H. Starin, as freighter, forwarder, bailee, common-carrier or for account of whom it may concern." Subsequently the vessel was almost wholly destroyed by fire, the cargo entirely destroyed, and the owner released under the Federal statutes from personal liability on the ground that the fire was not caused by his negligence. Subsequently the owner collected all the insurance money, which exceeded his loss as common carrier. In an action by an assignee of the owners of the cargo to recover a portion of the insurance money collected by the owner of the vessel;

Held, that the owner of the vessel was only entitled to indemnity and that whatever remained after satisfying his loss was held for those who might be concerned in the loss, to wit, the owners of the cargo.

DOWLING, J., dissented.

APPEAL by the defendants, Howard Carroll and another, as executors, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of February, 1909, upon the decision of the court, rendered after a trial at the New York Special Term, overruling a demurrer to the amended complaint.

APP. DIV.—VOL. CXLIX. 41

First Department, March, 1912.

every F. Cushman, for the appellants.

James Emerson Carpenter, for the respondent.

TT, J.:

ppelal by defendants from interlocutory judgment overruled demurrer to complaint.

In the year 1904 John H. Starin, defendants' decedent, was sole owner of a steamboat carrying freight and plying between the city of New York and the city of New Haven. Plaintiff's assignors, as well as a number of other persons, were shippers of goods by said vessel and had paid or agreed to pay freight therefor. On or about December 17, 1904, while on a voyage from New York to New Haven the said vessel was burned at the water's edge and almost wholly destroyed, and her cargo, including the goods of plaintiff's assignors, was entirely destroyed. Starin in due course instituted suit in the District Court of the United States for the District of New York, under the appropriate Federal statute, to relieve himself from personal liability, and on January 5, obtained a final decree from said court, adjudicating that the said fire and the destruction of merchandise as cargo was not due to any design, default or negligence of him, the said Starin, and that he was not liable for the destruction, damage or injury growing out of the condition of said vessel and her cargo. The question at issue is as to the right of plaintiff's assignors and others to participate in the proceeds of a certain policy of insurance held by said Starin at the time of the fire, and the amount of which he subsequently collected from the insurer. That policy contained the following statements respecting the assumed by the insurer, and the persons and things intended to be covered by said insurance: "The Insurance Company, New York, by this policy of insurance does insure John H. Starin, as freighter, forwarder, common-carrier or for account of whom it may come, if any, payable to him or order to the amount of \$10,000 goods, wares and merchandise, including live stock, gage while on board the following vessels: 'John H. Starin' against all loss, damage, detriment or hurt by fire, and

App. Div.]First Department, March, 1912.

and all the other risks, perils and dangers incident to and consequent upon the use and navigation of the waters of the port, bays and harbors of New York, East and North or Hudson Rivers, inland waters of New York, New Jersey, Long Island Sound and all waters adjacent or tributary to any of the above waters. Privileged to substitute other vessels of same class upon the approval in writing of this insurance company * * *.

"It is the intent of these insurers to fully indemnify the assured for all general average, charges and salvage expenses, and loss, damage, detriment or hurt to said property, but in no case shall this company be liable under this policy for a greater amount than the sums insured in this policy * * * loss limited to \$20,000 by any one vessel at any one time * * *. This insurance covers cargoes on and * * * under deck."

It is not alleged that Starin effected this insurance at the request of plaintiff's assignors, or that they were even aware that he held such insurance, nor is it alleged that they have paid or offered to pay any portion of the premium therefor. It is alleged that it was the intention of Starin to procure said insurance not only as common carrier, but as bailee of and for the benefit of the owners of goods carried as cargo. This appears to be a conclusion of the pleader drawn from the terms of the policy. It is alleged that Starin paid out a portion of the insurance money collected by him to other owners of merchandise destroyed by said fire and situated the same as plaintiff's assignors, but has refused to pay to the latter their *pro rata* share of the money so collected. From this allegation we may assume, what was indeed assumed on the argument, that the insurance money collected by Starin exceeded his individual loss as common carrier of the goods destroyed.

It is the settled law that the owner or charterer of a steamship has an insurable interest in goods in his possession to the full extent of their value against a loss for which it is possible that he may become responsible, and the question whether he has the right to recover upon the policy is not to be determined after the loss by inquiring whether he is in fact then liable to the owners on account of such loss. (*Munich Assurance Co.*

First Department, March, 1912.[Vol. 149.]

v. *Dodwell & Co.*, 128 Fed. Rep. 410; certiorari to U. S. Supreme Court refused, 195 U. S. 629; *Hagan v. Scottish Ins. Co.*, 186 id. 423; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606.)

The terms of the bills of lading under which Starin received the goods are not given, but it may at least be assumed that as carrier he was liable to the owners for loss by fire resulting from his design or negligence. As to this possible liability as well as to his claim to freight he had a direct insurable interest, and to the extent to which he had suffered loss he had a primary claim upon the insurance money. The liability as carrier for destruction of the cargo he escaped by the proceedings in the Federal court. His actual loss, therefore, as the event proved, was much less than the amount of insurance collected. The question we have to solve is to whom the balance belongs. This same question arose in *Pennyfeather v. Baltimore Steam Packet Co.* (58 Fed. Rep. 481), which was an action in equity similar in form to the present. It was held that the carrier, after paying its own losses, held the residue of the insurance money for the owners of the cargo. In *California Ins. Co. v. Union Compress Co.* (133 U. S. 387, 422) it is said: "But, as a bailee, under a policy taken out to cover property, his own or held by him in trust or on commission, may enforce the contract of insurance to the full value of the property destroyed, holding the proceeds primarily for his own benefit, and the balance for that of his bailor, the right of action of the plaintiff accrued on the occurring of the loss." In *Home Ins. Co. v. Baltimore Warehouse Co.* (93 U. S. 527, 543) it is said: "It is undoubtedly the law that wharfingers, warehousemen and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners. * * * Such insurance is not unusual, even when not ordered by the owners of goods, and when so made it inures to their benefit."

It is suggested that the foregoing cases are not controlling because of variances between the policies considered in them and the policy involved in this case, in the description of the

persons for whose benefit the insurance was effected. In the *Pennyfeather* case the policy had been taken out by a railroad company, and was made for the benefit of said company against a loss or damage by fire, "and also to insure each and all owners of such goods, wares, merchandise, baggage and property at time of loss." The policy was for \$25,000, all of which the carrier had collected. Under its bills of lading it was exempt from liability for loss by fire occurring from any cause whatsoever except as to goods not exceeding \$1,000 in value. In *Home Ins. Co. v. Baltimore Warehouse Co.* (*supra*) the policy covered loss or damage by fire on merchandise in possession of the insured, a warehouseman, "their own or held by them in trust, or in which they have an interest or liability." In *California Ins. Co. v. Union Compress Co.* (*supra*) the policy insured bailees against loss by fire of cotton "their own or held by them in trust or on commission."

In the policy involved in this action the insured is described as "John H. Starin, as freighter, forwarder, bailee, common carrier or for account of whom it may concern." We are of opinion that this phrase is the fair equivalent of those under consideration in the cases above cited. The effect of insurance "for Scottish Ins. Co. (*supra*)," and the words were held to be equivalent to the more specific phrase commonly used in English policies, in which the insurance is expressed to be "in the name of A. B. (the person effecting the policy) as well in his own name as for and in the name and names (without specification) of all and every other person and persons to whom the same (the property insured) doth, may or shall appertain, in part or in all." In both cases the phrase was deemed sufficiently broad to embrace all persons who have an insurable interest in the property at the time of loss and the right to be insured.

The court quoted with approval from Phillips on Insurance the rule that it is not necessary where insurance is effected "for account of whom it may concern" that the party to be benefited shall be known at the time of the issue of the policy, but that the insurer may intend it for whatever party shall prove to have an insurable interest in the specified subject, in

which case it will be applicable to the interest of the person subsequently ascertained to have such an insurable interest and who adopts the insurance. Further it was held that one may become a party of the insurance effected in his behalf, in terms applicable to his interest, without any previous authority from him, by adopting it either before or after a loss has taken place and is known to him. Here the plaintiff has adopted the insurance by asserting his right to share in its proceeds. It is manifest that Starin when he caused the words "for account of whom it may concern" to be inserted in the policy had in mind and intended that, in certain contingencies, some one other than himself should be entitled to share in the proceeds of the policies. That contingency did arise when a loss occurred under such circumstances that he was enabled to rid himself of liability. Who were then concerned in the proceeds of the policy over and above what was necessary to make Starin whole? Obviously the owners of the cargo must be deemed to have been intended to be covered by the phrase "of whom it may concern." He took out insurance for the full value of the cargo, or at least for much more than his interest therein. By the policy of our law he was entitled only to indemnity, and yet was permitted to collect the whole loss. Whatever remained after satisfying his loss was held for the benefit of those who might be concerned in the loss, to wit, the owners who adopted the policy as made for their benefit.

The judgment appealed from must be affirmed, with costs and disbursements, with leave to defendants to withdraw their demurrer and answer within twenty days on payment of all costs in the action.

CLARKE, McLAUGHLIN and LAUGHLIN, JJ., concurred; DOWLING, J., dissented.

Judgment affirmed, with costs, with leave to defendants to withdraw demurrer and to answer on payment of costs.

ISRAEL UNTERBERG, Appellant, *v.* ROBERT H. ELDER,
Respondent.

First Department, March 22, 1912.

Insurance — action to charge individual writers on Lloyd's policy of fire insurance — power of attorney construed.

Plaintiff, having obtained a judgment against attorneys for certain underwriters upon a Lloyd's policy of fire insurance and having failed to satisfy the judgment, sued one of the individual underwriters for whom the attorneys purported to act under a power of attorney in the form of an agreement made between the underwriters as parties of the first part and three attorneys as parties of the second part, "and by and between each of the parties of the first part, and by and between each of the parties of the second part." The defendant contended that the power was a joint power which could not be executed by less than all, and consequently he was not liable upon a policy executed by only two of his attorneys.

Held, that the power of attorney must be construed as a joint and several power so as to give effect to the apparent intention of the parties, and that the policy was binding although not executed by all the attorneys. A power of attorney given to two or more individuals will generally be presumed to be joint, unless the principal has indicated a different intention.

INGRAHAM, P. J., dissented, with opinion.

APPEAL by the plaintiff, Israel Unterberg, from a determination of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 29th day of June, 1911, reversing a judgment of the Municipal Court of the city of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 3d day of January, 1911.

Wendell P. Barker, for the appellant.

Michael F. O'Brien, for the respondent.

SCOTT, J.:

This is an action to charge defendant as an underwriter upon a so-called Lloyd's policy of fire insurance issued by Jefferson D. Bremer and Charles E. Ring, doing business under the firm name of Bremer, Fiske & Ring, acting or claiming to

act as attorneys in fact for defendant and twenty-nine other underwriters at "New York and New England Underwriters at Lloyds of New York City."

Plaintiff has complied with the requirements of the policy in so far as to obtain a judgment against the attorneys, and having failed in obtaining satisfaction of that judgment now sues the individual underwriters for whom the attorneys purported to act. The defense turns upon a single point. The authority of the attorneys to act for the individual underwriters is contained in a power of attorney signed by the several underwriters. The power executed by defendant appoints three persons attorneys for him, to wit, Charles E. Ring, John A. Fiske and J. D. Bremer, whereas, as has been said, the policy upon which suit is brought was executed by only two, to wit, Ring and Bremer. The defendant's contention is that the power was a joint power to these individuals which cannot be executed by less than all, and consequently that he is not liable upon a policy executed by only two of his attorneys. It is undoubtedly the general rule that a power of attorney given to two or more individuals will be presumed to be joint, unless the principal had indicated a different intention. (*Hawley v. Keeler*, 53 N. Y. 114.)

The power of attorney in the present case consists (1) of a statement of the parties to the power; (2) of certain preambles describing the nature of the business to be done and the reasons why the subscribers have appointed attorneys in fact; and (3) twenty clauses setting forth the powers, duties and obligations of the parties.

In these twenty clauses, which the Appellate Term (See 72 Misc. Rep. 363) describes as the operative clauses of the contract, the attorneys are always spoken of and referred to collectively, and if the contract consisted only of these clauses there would be much ground for the defendant's contention. It is plain, however, that when the contract in its operative clauses speaks of the "Attorneys" as authorized to do certain things, including the issuance of policies, the reference is to the attorneys mentioned and described in the 1st clause of the contract which specifies and defines the parties to the power. The document, although the particular copy in evidence is

First Department, March, 1912.

signed only by defendant, is drawn as if it was to be signed by all the subscribers. Its 1st clause reads as follows: "Agreement made and entered into this 7th day of July, 1902, by and between the underwriters or subscribers at the New York and New England Underwriters at Lloyds of New York City, parties of the first part, and Charles E. Ring, John A. Fiske and J. D. Bremer, subscribers, underwriters and attorneys at New York and New England Underwriters at Lloyds of New York City, parties of the second part, and by and between each of the parties of the first part, and by and between each of the parties of the second part." The significant words in this clause are those which I have italicized, and which appear to be devoid of meaning and significance, unless they be construed to mean that each subscriber creates each attorney his attorney to act as authorized by the whole agreement, thus granting a joint and several power to the three persons named as attorneys. If this be the true meaning of the clause, as we consider that it is, it follows that the powers given intended to be given to them jointly and severally, and may be not a case of controlling clear, operative clauses by an ambiguous recital, but a construction of an entire contract so as to give effect to the apparent intention of the parties. This, as we understand, is in accord with the construction given to the same power of attorney by the Appellate Division in the Second Department. (*Keuthen v. Elder*, 129 App. Div. 921.)

It follows that the determination of the Appellate Term must be reversed, and the judgment of the Municipal Court affirmed.

LAUGHLIN, CLARKE and MILLER, JJ., concurred; INGRAHAM, P. J., dissented.

INGRAHAM, P. J. (dissenting):

I do not concur in the reversal of this judgment. The power of attorney is in the form of an agreement made between the underwriters who were the parties of the first part and the three attorneys who were the parties of the second part, and

First Department, March, 1912.

[Vol. 149.]

the agreement was made "by and between each of the parties of the first part, and by and between each of the parties of the second part," thus imposing an individual obligation upon each of the parties to the agreement which would be several as well as joint. When, however, it comes to the agreement part of the instrument there is nothing to indicate that the parties intended that any one of the attorneys could act for and on behalf of the principals. Thus it is provided: "*First.* The parties of the first part shall, as attorneys for and in behalf of the subscribers and underwriters * * * do a fire insurance business principally and all other form and kind of insurance by law permitted, which the said parties of the second part [the attorneys] may deem profitable, safe and prudent." And in each one of the subsequent provisions where the attorneys are authorized to bind the principals they are described as the parties of the second part, and the authority which is given to the attorneys is always conferred upon the three individuals named as the attorneys. When, however, the instrument speaks of the principals it in each case describes them as individuals and not collectively. Thus in the 4th provision it is provided: "The said subscribers, each for himself, agrees to pay," etc. The 5th provision provides that "each of the parties of the first part [the principals] hereby authorize and empower the parties of the second part [the agents] to do and perform for them and in their stead and in the name of the New York and New England Underwriters as Lloyds of New York City, any and every act or acts in relation to the writing, signing, renewing and indorsing any policy of contract of insurance accepted by them as attorneys for the New York and New England Underwriters at Lloyds of New York City, which and to do and perform all acts and things necessary for the proportion of the business of the said New York and New England Underwriters at Lloyds of New York City, which either of the parties of the first part could for himself, herself or themselves perform, giving to the said parties of the second part as attorneys in fact of the parties of the first part full power and authority therefor."

I think that the whole agreement shows plainly upon its face that there was no authority conferred upon any one of these

App. Div.] First Department, March, 1912.

agents to contract on behalf of the principals, but the authority was vested in the three agents authorizing them to make a contract which would be binding upon the principals. There was no evidence in the record to show why all three of the agents did not act on behalf of the principals in making the contract sued on, and it seems to me that the principals had the right to the judgment of each of the agents, and that unless all three of them agreed as to placing insurance that no valid contract of insurance was made.

I, therefore, think the court below was right in refusing to enforce the contract and that the determination should be affirmed, with costs.

Determination reversed, with costs in this court and in the Appellate Term, and judgment of Municipal Court affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK, Relator, *v.* SANDROCK REALTY COMPANY and ROBERT MUH and Others, Composing the Board of Assessors of the City of New York, Respondents.

First Department, March 22, 1912.

Eminent domain — Laws of 1894, chapter 147, and Laws of 1897, chapter 664, authorizing construction of bridge across the Harlem river construed — certiorari to review action of board of assessors.

Certiorari to review the proceedings of the board of assessors of the city of New York in awarding damages caused by a change of grade of Willis avenue in erecting a bridge across the Harlem river pursuant to Laws of 1894, chapter 147, and Laws of 1897, chapter 664. Statutes construed, and held, that the proceedings before the board of assessors should be dismissed.

LAUGHLIN, J., dissented, with opinion.

CERTIORARI issued out of the Supreme Court and attested on the 2d day of June, 1905, directed to Robert Muh and others, composing the board of assessors of the city of New York, commanding them to certify and return to the office of the

clerk of the county of New York all and singular their proceedings had in relation to the claim of the Sandrock Realty Company for damages caused by the change of grade in a city street.

Clarence L. Barber, for the relator.

Morgan J. O'Brien of counsel [*A. C. & F. W. Hottenroth*, attorneys], for the respondents.

MILLER, J.:

This case is before us on a writ of certiorari to review the proceedings of the board of assessors in which an award was made to the respondent, the Sandrock Realty Company, for damages caused by change of grade of Willis avenue as originally laid out. By chapter 147 of the Laws of 1894 the Legislature authorized the commissioner of public works of the city of New York to construct a bridge with suitable approaches from a point at the intersection of One Hundred and Twenty-fifth street and First avenue northeasterly across the Harlem river to and along Willis avenue to One Hundred and Thirty-fourth street, and to make such changes in the grade lines of the streets or avenues approaching said bridge as might be necessary. We are concerned with the construction of sections 3 and 4 of that act, which are as follows:

“§ 3. The expense of making all necessary surveys, preparing the plans and specifications, and of constructing the said bridge and approaches thereto, with the necessary abutments and arches as aforesaid, shall not exceed two million dollars, and such further sum for paying awards for damages caused by reason of the change of grade of streets or avenues approaching the same authorized by this act, as may be awarded by the board of assessors of the said city, whose duty it shall be to estimate the damage which each owner of land fronting on such street or avenue will sustain by reason of such change to such land, or to any improvements thereon, and make a just and equitable award to the amount of such damage to the owner or owners of such lands or tenements fronting on such street or avenue, and opposite thereto, and affected by such change of grade. The comptroller of said city shall, from time to time, when

App. Div.] First Department, March, 1912.

directed by the board of estimate and apportionment, prepare and issue bonds of said city, bearing interest at not more than four per centum per annum, and redeemable from time to time, but not less than twenty years after the date thereof, for the purpose of defraying the expense of making all necessary surveys, preparing plans and specifications and of constructing the said bridge and approaches thereto, with the necessary abutments and arches as aforesaid, and for paying the awards which may be made for damages by reason of any change of grade as aforesaid. Such bonds shall not be sold for less than the par value thereof, and the moneys received from the sale of the said bonds shall be deposited in the treasury of the said city, and shall be drawn and paid by the comptroller of the said city for the several objects and purposes provided in this act, upon vouchers in a form to be prescribed by the said comptroller.

“§ 4. With the consent and approval of the board of estimate and apportionment first had and obtained the commissioner of public works, for and in behalf of the mayor, aldermen and commonalty of the city of New York, is thereby authorized to acquire title in fee to any land which he may deem necessary for the purpose of the construction of the said bridge and approaches, with the necessary abutments or arches as aforesaid, and to acquire any right or easement which it may be necessary to take for the purpose of constructing that portion of the approach to said bridge between Harlem river and One Hundred and Thirty-second street, which said portion of said approach shall be a viaduct built of steel or iron, and to that end the said commissioner may make application to the Supreme Court in the first judicial district for the appointment of commissioners of estimate, specifying in such application the lands sought to be acquired for the purpose aforesaid. The provisions of law relating to the taking of private property for public streets or places in the said city are hereby made applicable as far as may be necessary to the acquiring of the said land as aforesaid. The amount or amounts awarded for the said land and the expense of the proceedings hereby authorized for the acquiring of the same shall form part of and be included within the expense of constructing the said bridge

and approaches thereto, with the necessary abutments and arches authorized by the third section of this act."

Willis avenue, as originally laid out, was one hundred feet in width. Proceeding north from the river, it is intersected by One Hundred and Thirty-second street, Southern boulevard or One Hundred and Thirty-third street and One Hundred and Thirty-fourth street in the order named. The approach to the bridge as it was finally completed in August, 1901, occupies seventy feet of the center of Willis avenue. For the purpose of widening Willis avenue between One Hundred and Thirty-fourth street and Southern boulevard, the city, on May 22, 1897, took title to a strip thirty-five feet in width on ~~each side,~~ ^{149 App. Div.} thus making on each side of the bridge approach feet in width. This and three other cases, (*People ex rel. City of New York v. Goossen* 660; *People ex rel. City of New York v. Br* Id. 661; *People ex rel. City of New York v. C* involve lots on the east side of Willis avenue between boulevard and One Hundred and Thirty-fourth street which said thirty-five-foot strip was taken.

\$18,780 was made to the owner of the lots at ~~the time of the~~ taking for the land taken. In their report the commissioners of estimate said: "In making the final awards, the Commissioners assumed that the fee to the lands taken vests absolutely in the City, subject only to the public use of a strip fifty feet wide on either side of the approach as a public street forever." It thus appears that the theory upon which the award was made accorded with the actual fact, i. e., that the land was taken to widen the street and was not to be used for the construction of the bridge approach. Treated strictly as a condemnation proceeding to determine the damages for land ~~taken~~ ^{149 App. Div.} for public use, the claimant was not entitled to damages for part not taken by reason of the construction of the bridge approach, for the part taken was not to be used for that purpose. Therein the case differs from *People ex rel. City of New York v. Lyon* (114 App. Div. 583). After the construction of the bridge approach, claims for damages of the construction of it were presented to the board of assessment by the owners of the lots from which the thirty-five-

App. Div.] First Department, March, 1912.

was taken. The claimant in this case, the owner of two lots, was allowed \$10,000. The expert for the city testified that the land damage was \$5,000.

The claim is plainly a meritorious one, but the question preliminary to a consideration of its merits is whether the statute gave the board of assessors jurisdiction to make the award, and, after carefully analyzing it, I have been reluctantly forced to the conclusion that it did not.

It is to be observed that the Legislature made two different provisions for two different classes of damage, one for damages for change of grade and the other for damages for land or easements taken. The first, pursuant to section 3, were to be awarded by the board of assessors; the second, pursuant to section 4, by commissioners of estimate. It is plain that the Legislature regarded the easements of light, air and access of the abutters on Willis avenue as property to be taken and paid for. The act, as first passed, authorized the city "to acquire any right or easement which it may be necessary to take for the purpose of constructing that portion of the approach to said bridge between Harlem river and One Hundred and Thirty-second street." By chapter 664 of the Laws of 1897 (amdg. § 4) it was provided that the commissioners of estimate should estimate the damages, if any, to be sustained by the owners of property fronting on Willis avenue, between One Hundred and Thirty-second street and One Hundred and Thirty-third street or Southern boulevard, by reason of the construction and maintenance of the bridge approach, and should include in their report the awards for such damages. It is obvious that the reason for not taking in the block between One Hundred and Thirty-fourth street and Southern boulevard was that Willis avenue in that block was to be widened so as to provide for a street fifty feet in width on either side of the approach at the original grade of the street. It is immaterial that it turned out that the Legislature was wrong in supposing that, with the widened street, the bridge approach would occasion no damage to the abutting owners because of interference with their easements of light, air and access, for the conclusion is irresistible by reason of the specific provisions for the award of damages to abutters on Willis ave-

nue, first, from the river up to One Hundred and Thirty-second street, and, later, from One Hundred and Thirty-second street to Southern boulevard, that the Legislature intended that the commissioners of estimate should award the damages to said abutters for interference with the easements of light, air and access, and that it limited their jurisdiction on that head to property between the river and the Southern boulevard. The language of the act also shows that the Legislature regarded the interference with such easements as a taking, the damages for which were to be assessed in the usual way in condemnation proceedings. It is of no consequence that in legal effect such an interference would not constitute a taking within the meaning of section 1 of the 14th amendment of the Constitution of the United States. (See *Sauer v. New York*, 206 U. S. 536.)

It being demonstrated, then, that the Legislature intended by section 4 of chapter 147 of the Laws of 1894, and by chapter 664 of the Laws of 1897, to provide for compensation to those abutters on Willis avenue who, it was thought, would suffer damage from the interference with their easements of light, air and access, we are prepared to construe said section 3, above quoted, and to determine what damages were to be awarded by the board of assessors, *i. e.*, "damages caused by reason of the change of grade of streets or avenues approaching the same," *i. e.*, "said bridge and approaches thereto." It is plain that, when the original act was passed, it was thought possible that a plan might be adopted which would necessitate a change of grade of the streets intersecting Willis avenue; and, with that possibility in mind, the Legislature provided for damage to property owners affected by such change of grade. While the construction of the viaduct or approach in the center of the street may be deemed a regulation thereof, it is plain that it was not the kind of change of grade that the Legislature provided for by section 3. The street in front of the claimant's premises remains at the old grade. In the center of it, as widened, is a structure which interferes with the claimant's easements of light, air and access. The Legislature did not provide for the case, and the court cannot supply that omission by adopting a construction which the statute was plainly not intended to bear.

The writ should be sustained and the proceedings before the board of assessors dismissed.

INGRAHAM, P. J., McLAUGHLIN and CLARKE, JJ., concurred;
LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

Willis avenue was a public highway of the city of New York. The Legislature, by section 1 of chapter 147 of the Laws of 1894, authorized the construction of a bridge over the Harlem river to connect said avenue, and a change of grade of the avenue to form an approach to the bridge at the proper elevation. In order to afford sufficient street facilities on the incline formed by the approach, and to afford access to the property abutting on the street at the sides of the approach but on a lower level, the Legislature by the same act authorized the condemnation of lands, and pursuant to such authority a strip of land thirty-five feet in width was taken on either side of the avenue, in the block between Southern boulevard and One Hundred and Thirty-fourth street, for the purpose of widening the avenue. The incline forming the approach to the bridge commenced near One Hundred and Thirty-fourth street, and from that point toward Southern boulevard and the Harlem river the grade of seventy feet of Willis avenue, which was one hundred feet in width, was changed, forming a permanent obstruction directly in front of the property of the respondent company, leaving, however, the strip of thirty-five feet so taken and fifteen feet of the original avenue, making fifty feet of street in all between the remaining lands of the respondent company and the exterior lines of the incline forming the approach to the bridge. It is thus seen that the incline forming the approach to the bridge was constructed wholly within the exterior lines of Willis avenue as it formerly existed, and that no part of it was nearer than fifteen feet to the lands so condemned to widen the avenue. It is perfectly plain, I think, that the condemnation commissioners were not authorized to make, and did not attempt to make, an award for damages to the lands of the respondent company caused by the construction of the approach to the bridge, which,

as has been seen, opposite the lands of the said respondent company constituted a change of grade of the central part of the avenue. The record shows that the condemnation commissioners followed the general rule, and determined the value of the parcel as a whole before the taking and the value of the parcel remaining after the taking in view of the use to which the *lands taken* were to be appropriated. The lands thus taken were to be appropriated and used for *street purposes only*; and no part of the approach or viaduct was to be erected thereon, and there was to be no change of grade of the lands thus taken. In these circumstances it is quite clear, I think, that the owners of land, part of which was thus taken in the block between Southern boulevard and One Hundred and Thirty fourth street, whose remaining lands abutted on the street, were entitled to an award by the board of assessors of any damages caused by such change of grade in front of their property, for by the express provisions of section 3 of the act, the board of assessors were commanded to estimate and award damages to each owner of land fronting on the street caused by the change of grade. The fact that the Legislature by section 4 of the act *erroneously* assumed that, by the change of grade where there was to be a high steel viaduct between One Hundred and Thirty-second street and the Harlem river, the easements of abutting property owners would there be taken for which they would be entitled to damages to be determined by a constitutional condemnation commission, and by chapter 664 of the Laws of 1897 (amdg. § 4) extended that theory to the block between One Hundred and Thirty-second street and One Hundred and Thirty-third street, but not to the block in question, does not aid the relator, for if the erection of the viaduct between One Hundred and Thirty-second street and the Harlem river constituted a taking of *easements*, as the Legislature plainly supposed, it would not have been competent for the Legislature to confer authority on the board of assessors to estimate the damages, which, doubtless, accounts for those damages having been sent to a *constitutional* condemnation commission. The Legislature had fully conferred authority on the board of assessors to ascertain and award damages for a *change of grade*, and that authority remained appli-

App. Div.] First Department, March, 1912.

cable to lands in the block between Southern boulevard and One Hundred and Thirty-fourth street, where the Legislature evidently considered that since the incline started just above that block it there only constituted a change. A change of grade for a street use, however, does not constitute a taking of private easements for which compensation must be made. (*Sauer v. New York*, 206 U. S. 536; 180 N. Y. 27; 90 App. Div. 36.) The Legislature, therefore, was under no obligation in the case at bar either to provide for an award of damages for interference with easements or for the change of grade, either by the condemnation commissioners or the board of assessors; but it evidently intended to provide for both, and it was competent for it to do so. I find nothing in the amendments to the act indicating that the Legislature intended to repeal the authority of the board of assessors to award damages for the change of grade, which, I think, was originally clearly conferred with respect to Willis avenue by section 3 of the act. By the original act the authority to award such damages was, upon an erroneous theory, as already stated, conferred upon the condemnation commissioners with respect to lands abutting on the avenue between the Harlem river and One Hundred and Thirty-second street, and such authority was later extended to the next block to the north (Laws of 1897, chap. 664, amdg. § 4), but the authority conferred upon the board of assessors by section 3 of the original act with respect to damages for changes of grade in other blocks was not only never repealed, but it was re-enacted by chapter 607 of the Laws of 1901 (amdg. § 3). I am of opinion, therefore, that the board of assessors were authorized to award damages for the change of grade of Willis avenue caused by the incline forming the approach to this bridge, and I vote to affirm the proceeding and to dismiss the writ.

Writ sustained and proceedings before the board of assessors dismissed. Order to be settled on notice.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK, Relator, v. JULIA E. GOOSSEN and ROBERT MUH and Others, Composing the Board of Assessors of the City of New York, Respondents.

First Department, March 22, 1912.

See head note in *People ex rel. City of New York v. Sandrock R. Co.* (*ante*, p. 651).

CERTIORARI issued out of the Supreme Court and the 2d day of June, 1905, directed to Robert Muh composing the board of assessors of the city of New York commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings had in relation to the claim of Julia E. Goossen for damages caused by the change of grade in a city street.

Clarence L. Barber, for the relator.

Morgan J. O'Brien of counsel [A. C. & F. W. Ho attorneys], for the respondents.

PER CURIAM:

For the reasons stated in the opinion in *People ex rel. City of New York v. Sandrock R. Co.* (149 App. Div. 2d, 651), decided herewith, the writ should be sustained and the proceedings before the board of assessors dismissed.

Present—INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN, C. J., and MILLER, JJ.; LAUGHLIN, J., dissented.

Writ sustained and proceedings before the board of assessors dismissed. Order to be settled on notice.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK, Relator, *v.* BRONX BATH COMPANY and ROBERT MUH and Others, Composing the Board of Assessors of the City of New York, Respondents.

First Department, March 22, 1912.

See head note in *People ex rel. City of New York v. Sandrock R. Co.* (*ante*, p. 651).

CERTIORARI issued out of the Supreme Court and attested on the 2d day of June, 1905, directed to Robert Muh and others, composing the board of assessors of the city of New York, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings had in relation to the claim of the Bronx Bath Company for damages caused by the change of grade in a city street.

Clarence L. Barber, for the relator.

Morgan J. O'Brien of counsel [*A. C. & F. W. Hottenroth*, attorneys], for the respondents.

PER CURIAM:

For the reasons stated in the opinion in *People ex rel. City of New York v. Sandrock R. Co.* (149 App. Div. 651), decided herewith, the writ should be sustained and the proceedings before the board of assessors dismissed.

Present — INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN, CLARKE and MILLER, JJ.; LAUGHLIN, J., dissented.

Writ sustained and proceedings before the board of assessors dismissed. Order to be settled on notice.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK, Relator, *v.* OLE OLSEN and ROBERT MUH and Others, Composing the Board of Assessors of the City of New York, Respondents.

First Department, March 22, 1912.

See head note in *People ex rel. City of New York v. Sandrock R. Co.* (*ante*, p. 651).

CERTIORARI issued out of the Supreme Court and attested on the 2d day of June, 1905, directed to Robert Muh and others, composing the board of assessors of the city of New York, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings had in relation to the claim of Ole Olssen for damages caused by the change of grade in a street.

Clarence L. Barber, for the relator.

Morgan J. O'Brien of counsel [*A. C. & F. W. Hottenroth*, attorneys], for the respondents.

PER CURIAM:

For the reasons stated in the opinion in *People ex rel. City of New York v. Sandrock R. Co.* (149 App. Div. 651), decided herewith, the writ should be sustained and the proceedings before the board of assessors dismissed.

Present — INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN, CLARKE and MILLER, JJ.; LAUGHLIN, J., dissented.

Writ sustained and proceedings before the board of assessors dismissed. Order to be settled on notice.

App. Div.]First Department, March, 1912.

SOLOMON ROSENFIELD, Plaintiff, v. SAMUEL W. PECK, Defendant.

First Department, March 22, 1912.

**Husband and wife — action against husband to recover for goods sold
wife — question for jury — evidence.**

Where, in an action by a tradesman to recover for goods sold to defendant's wife, it appeared that at the time of the purchase the defendant and his wife were living together; that defendant was a man of means in the habit of making his wife a liberal allowance for her personal uses; that the goods for which suit was brought were of the same general character as the wife had been in the habit of buying, and that the bill was made out to the wife, it is for the jury to say whether the articles were necessaries and whether they were sold on the husband's credit or on that of his wife. A dismissal of the complaint was error.

Evidence that long after the purchases in question the husband inserted a notice in a newspaper that he would no longer be responsible for his wife's bills was inadmissible.

INGRAHAM, P. J., and LAUGHLIN, J., dissented, with opinion.

MOTION by the plaintiff, Solomon Rosenfeld, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon the verdict of a jury in favor of the defendant rendered by direction of the court after a trial at the New York Trial Term in January, 1909.

Max D. Steuer, for the plaintiff.

Sol. Kohn, for the defendant.

SCOTT, J.:

This is an action by a tradesman to recover for goods sold to defendant's wife. At the close of the whole case the complaint was dismissed. The exceptions raised the question whether the case should not have been submitted to the jury.

At the time of the purchase the defendant and his wife were living together in the city of New York. The defendant was a man of means, enjoying a large income and had been in the habit of making his wife a liberal allowance for her personal uses, and occasionally supplementing the usual allowance by giving her other sums of considerable size.

First Department, March, 1912.

icles of clothing for which suit is brought were of general character as those which the wife, presumably husband's knowledge, had been in the habit of buying. They certainly were not necessaries, strictly speaking. But we think that a question of fact was presented whether or not they were necessaries in the sense that articles of dress suitable to the wife's station in life, and his means and their standards of himself had adopted and approved.

Evidence presented on behalf of plaintiff finding that the goods were of a kind which had been used by the wife, and were appropriate to the life and the wonted style of living of defendant. It was then open to the husband to prove that the wife was amply supplied with articles of dress of the same character as those purchased, or that she had sufficient money to pay cash therefore. (*Wanamaker v. Weaver*, 176 N. Y. 78-82.) This, however, was not a defense. In our opinion it was for the husband to prove that the articles furnished were necessary, which that word is used in a case like this to mean whether or not the husband had succeeded in his acts relied upon in defense. It was error to submit these questions as matter of law.

The question in the case is whether or not the wife relied on the faith of the husband's credit or on the credit of the defendant. Here again, as we consider, the question was left to the jury. While the bill was made out to the wife, plaintiff testified in effect that he trusted her upon the defendant's credit, and while plaintiff himself had evidently sold to the wife on credit, it appeared that he had long been connected with an establishment from which he had been in the habit of purchasing similar articles and whose bills had been paid. "If a wife is given the right to trade, with whom she is acquainted and whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her." (*Wanamaker v. Weaver, supra.*) We consider

App. Div.]

First Department, March, 1912.

that, under the circumstances, a jury might find that the husband had impliedly authorized his wife to purchase, on credit, goods of the character that she had been in the habit of buying.

The proof that long after the purchases in question the husband had inserted in a Paris newspaper a notice that he would no longer be responsible for his wife's bills was properly rejected, and the plaintiff can take nothing by his exception thereto.

We think, however, that the exceptions must be sustained and a new trial ordered, with costs to plaintiff to abide the event, for the error of the court in refusing to submit to the jury the questions of fact above indicated.

CLARKE and MILLER, JJ., concurred; INGRAHAM, P. J., and LAUGHLIN, J., dissented.

INGRAHAM, P. J. (dissenting):

I think this judgment should be affirmed. The complaint alleges that between the 16th of April, 1907, and the 22d of May, 1907, the plaintiff rendered services to the defendant, at his request, in the making up one brown leather coat, one blue and white suit, one blue taffeta coat, one pique suit and one white serge suit, and that the plaintiff then and there furnished the material necessary to the said work and incident thereto upon like request. There is no allegation in the complaint that the goods furnished were clothing for the defendant's wife or were necessaries furnished to the wife, the cause of action being solely based upon the allegation that the goods in question were furnished to the defendant at his request and for which he either expressly or impliedly promised to pay. Plaintiff proved that he furnished these goods to the defendant's wife, who was at that time living with him in the city of New York. The evidence shows conclusively that the goods sold and delivered were charged to the wife and it was the wife and not the defendant to whom the plaintiff looked for payment. There is no evidence that the defendant ever knew that his wife had purchased goods of the plaintiff; that he ever recognized her authority to make such purchases by paying her bills on former

First Department, March, 1912.

[Vol. 149.]

purchases, but the evidence is undisputed that the defendant had furnished his wife with ample means to provide her with clothing and other necessaries. If any assumption can be indulged in it must be that the wife had paid for goods when formerly purchased by her from the moneys supplied by the defendant for that purpose. There is absolutely no evidence to justify a finding that the wife assumed to act as her husband's agent in the purchase of these goods or that the plaintiff relied upon the husband's credit in furnishing the goods to the defendant's wife. I understand that it is now settled in this State that the mere fact that a man and his wife are living together is not sufficient to justify a finding that the wife was authorized to purchase goods as the husband's agent, and that in the absence of some evidence that the goods purchased by her with the authority of the husband or of some knowledge by the husband of the purchase, or some act of the husband implied which authority to make such purchases for him can the husband be liable upon the theory of agency. ~~12~~ ~~13~~ ~~14~~ ~~15~~ ~~16~~ ~~17~~ ~~18~~ ~~19~~ ~~20~~ ~~21~~ ~~22~~ ~~23~~ ~~24~~ ~~25~~ ~~26~~ ~~27~~ ~~28~~ ~~29~~ ~~30~~ ~~31~~ ~~32~~ ~~33~~ ~~34~~ ~~35~~ ~~36~~ ~~37~~ ~~38~~ ~~39~~ ~~40~~ ~~41~~ ~~42~~ ~~43~~ ~~44~~ ~~45~~ ~~46~~ ~~47~~ ~~48~~ ~~49~~ ~~50~~ ~~51~~ ~~52~~ ~~53~~ ~~54~~ ~~55~~ ~~56~~ ~~57~~ ~~58~~ ~~59~~ ~~60~~ ~~61~~ ~~62~~ ~~63~~ ~~64~~ ~~65~~ ~~66~~ ~~67~~ ~~68~~ ~~69~~ ~~70~~ ~~71~~ ~~72~~ ~~73~~ ~~74~~ ~~75~~ ~~76~~ ~~77~~ ~~78~~ ~~79~~ ~~80~~ 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App. Div.]

First Department, March, 1912.

dence to justify the jury in finding that the husband was liable to the plaintiff for the goods purchased by his wife.

I think, therefore, the court was justified in directing a verdict for the defendant and that the judgment should be affirmed.

LAUGHLIN, J., concurred.

Exceptions sustained, new trial ordered, costs to plaintiff to abide event. Order to be settled on notice.

WILLIAM F. SPENCER, Respondent, *v.* JAMES D. HARDIN,
Appellant.

First Department, March 22, 1912.

Appeal from order denying new trial — absence of exceptions — weight of evidence — theory of trial — sale — failure to demand delivery — damage — value of stock — erroneous charge.

On an appeal from an order denying a motion for a new trial the Appellate Division may, notwithstanding absence of exceptions, consider the weight of evidence and the question as to whether the case was tried upon a wrong theory.

Where a contract to sell shares of stock named no time for delivery, a demand is necessary in order to put the seller in default.

Where no demand for delivery was made before the stock became valueless through the failure of the corporation, it is error to charge in substance that if the contract was made and there was no delivery the buyer is entitled to recover the price of the stock at the time of the contract.

Moreover, where the stock was not listed on an exchange and there was no open market therefor the amount of damages for the breach of contract of sale is for the jury.

APPEAL by the defendant, James D. Hardin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 5th day of April, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 6th day of April, 1911, denying the defendant's motion for a new trial made upon the minutes.

First Department, March, 1912.

George H. Fletcher, for the appellant.

Joseph M. Baum, for the respondent.

SCOTT, J.:

The action is brought to recover damages for the failure of defendant to deliver to plaintiff 100,000 shares of the capital stock of the Branch Mint Mining and Milling Company, which, as plaintiff alleges, he purchased in May, 1905. The agreement for sale is said to have been an oral one, as to which plaintiff and defendant alone are able to testify directly. The former alleges that the sale was made, the latter denies it. It is not claimed that the enterprise was a fraudulent one, but it ultimately proved to be a failure. The company had issued an enormous amount of stock, mainly or wholly to defendant, who was engaged in and about the year 1905 in selling it through the efforts of plaintiff, who was compensated for services. The price at which the stock was offered to public investors was fifteen cents per share, and apparently a considerable amount was sold by defendant at that figure, on occasion, he was able to buy back shares at a much lower price. The stock was not listed on any exchange, there was no open market for it.

There is a notable lack of exceptions in the record, but appeal from the order denying the motion for a new trial are authorized to consider the weight of the evidence in question whether or not the case was tried upon a wrong theory. (*Goldman v. Swartwout*, 117 App. Div. 185, 188.)

Whether or not any contract was ever made rests upon the testimony of the interested parties and so far the evidence may be said to be equally balanced. From the time the sale is said to have been made until after the failure of the enterprise has been demonstrated plaintiff and defendant apparently remained on terms of intimacy and engaged in frequent correspondence relating to the affairs of the company. It is very significant that in all this correspondence no reference is made to any claim of stock to plaintiff or any claim he had to a delivery of stock upon such sale.

If, however, plaintiff's version of the sale be accepted as

App. Div.]

First Department, March, 1912.

no time was agreed upon within which the stock was to be delivered, and in order to put defendant in default a demand was necessary. Plaintiff attempted to prove such a demand in July, 1905, but it is evident that if any demand was then made it was waived, and not persisted in. A formal demand, and the only one clearly proven, was made in 1908 after the enterprise had failed and the stock doubtless had become valueless.

The court did not leave the question of damages to the jury, but charged that if it was found that the contract of sale had been made (non-delivery being admitted) plaintiff was entitled to recover the value of the stock estimated at fifteen cents per share. This was doubtless upon the theory that if the stock had been delivered when, or shortly after, the sale had been made the plaintiff would have been able to sell it at the price named. If, however, as we consider, defendant was not in default until the formal demand was made upon him in 1908, the verdict rendered under this charge was much too large, and in any event, since there was never an open market for the stock, the question of the amount of damages was for the jury.

We are, therefore, of the opinion that the verdict was arrived at by the application of an erroneous rule of damages, and that the judgment cannot be sustained upon the evidence. It will, therefore, be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., LAUGHLIN, CLARKE and MILLER, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

First Department, March, 1912.

[Vol. 149.]

ROBERT S. SMITH, Appellant, *v.* MAX RUBEL, *Respondent.*

First Department, March 22, 1912.

Discovery — inspection of books of insolvent corporation — laches.

The plaintiff in an action for damages resulting from false representations whereby the defendant, an individual, induced him to purchase stock of a corporation which subsequently became bankrupt, is entitled, on learning that the books of the corporation have come into the defendant's hands, to inspect them in order to enable him to prove the facts as to which the false representations were made.

The examination should not be denied on the ground of *laches*, ~~unless~~ the motion therefor was not made until the case was ~~about~~ if the plaintiff learned that the books were in the defendant only a few days before the motion and the defendant ~~had~~ prejudiced by the delay.

APPEAL by the plaintiff, Robert S. Smith, from a ~~decision~~ the Supreme Court, made at the New York Special entered in the office of the clerk of the county of New York on the 7th day of February, 1912, denying the plaintiff's application for a discovery and inspection of certain books.

Harold Nathan, for the appellant.

David C. Hirsch, for the respondent.

SCOTT, J.:

The action is for damages for alleged false representations whereby, as it is said, defendant induced plaintiff to purchase stock in a corporation which has since become bankrupt. The allegations related to the condition of the corporation, the value of the assets and the book value of its stock. Since bankruptcy the defendant has come into possession of the books of the corporation, and the plaintiff seeks to procure from them the true facts as to which, as it is said, the defendant made the false representations. The application was denied as appears from the order, because of plaintiff's laches, presumably on the fact that the application for inspection was not made until the cause was about to be tried. The defendant does not appear to have been prejudiced by the delay.

App. Div.] First Department, March, 1912.

it affirmatively appears that plaintiff only learned that the books were in defendant's possession two or three days before the motion was made. In so far as appears there was no reason why plaintiff should have assumed that the books had been delivered to defendant. The books are not defendant's any more than they are plaintiff's and we see no reason why plaintiff should not be allowed to inspect them before trial.

The order should be reversed, with ten dollars costs and disbursements, and motion granted.

INGRAHAM, P. J., LAUGHLIN, CLARKE and MILLER, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK EDISON COMPANY, Relator, v. WILLIAM R. WILLCOX and Others, Respondents.

First Department, March 29, 1912.

Certiorari — record — omission of return — remedy where return defective.

A record in the Appellate Division on certiorari directed to the Public Service Commission and to a public service corporation should contain the return of the latter as well as that of the Commission.

The remedy of the relator if the return were defective or contained improper matter was a motion for a further return, and in the absence of such motion the return cannot be excluded from the record.

MOTION to dismiss a writ of certiorari or that the printed record filed by the relator be corrected by adding to it the duly certified copy of the return to said writ made by the Long Acre Electric Light and Power Company and filed with the clerk of the county of New York on January 12, 1912.

Graham & L'Amoreaux, for the motion.

Morgan J. O'Brien and Henry J. Hemmens, opposed.

First Department, March, 1912.

[Vol 149.]

PER CURIAM:

The relator obtained from the Supreme Court *a writ of certiorari directed to the Public Service Commission of the State of New York for the First District and to the Long Acre Electric Light and Power Company.* After the necessary recitals the writ commanded those to whom it was addressed within twenty days after the service of the writ that they "do certify and return all and singular your proceedings and decisions had and made in the premises, together with all testimony and evidence, both documentary and otherwise, upon which you proceeded or arrived at your determination in the premises to the end that your determination and action in the premises may be reviewed and corrected on the merits in this court, and your proceedings and orders may be reviewed and corrected and said orders vacated and annulled if to the court it shall seem just and proper." In response to that writ the Public Service Commission made and filed its *return as prescribed by the writ.* The Long Acre Electric Light and Power Company also made and filed a return to this writ, relator, disregarding the return of the Long Acre Co., caused the papers to be printed and filed which contained a petition for the writ and the instruments thereto annexed, the writ itself, and the return by the Public Service Commission, but did not print and file the return of the Long Acre Company.

By section 2134 of the Code of Civil Procedure it is provided that "the clerk, with whom a writ of certiorari is filed, shall file each person, upon whom a writ of certiorari is served, a copy of the writ, or of the copy thereof served, upon him, a return, with a transcript annexed, and certified to him, of the record or proceedings, and a statement of the other matters, specified in and required by the writ." Section 2135 of the Code of Civil Procedure authorizes the court to direct a further return if the return is defective and to enforce the making of the return. Section 2137 of the Code of Civil Procedure provides for bringing in a third party specially and beneficially interested in upholding the determination to be reviewed. And section 2138 of the Code of Civil Procedure provides that the cause must be heard at a term of the Appellate

App. Div.]First Department, March, 1912.

Division of the Supreme Court upon the writ and return and the papers upon which the writ was granted.

The Long Acre Company having been made a party to the proceeding, and having by the writ been required to make a return, its return became a part of the proceeding upon which the matter was required to be heard, and we think, therefore, that the return of the Long Acre Company should be part of the record upon the appeal. If the return is defective or contains matter improperly inserted the relator could have made a motion to have it corrected, but no such motion having been made, we think the return must be included in the papers upon which the proceeding is to be determined.

The motion is, therefore, granted to the extent of requiring the relator to annex to the printed papers upon which the proceeding is to be heard a copy of the return of the Long Acre Electric Light and Power Company.

Present — INGRAHAM, P. J., McLAUGHLIN, CLARKE, SCOTT and DOWLING, JJ.

Motion granted to extent stated in opinion.

THE S. H. POMEROY COMPANY, Appellant, v. WELLS BROTHERS COMPANY OF NEW YORK, Respondent.

THE S. H. POMEROY COMPANY, Appellant, v. WELLS BROTHERS COMPANY OF NEW YORK, Respondent.

First Department, March 22, 1912.

Pleading — bill of particulars — when bill sufficient — costs — amendment.

The plaintiff in an action to recover for the breach of the defendant's contract to buy articles to be manufactured by the plaintiff for the construction of a building, claiming that he had partially executed the contract before the defendant repudiated it, should not be required to give a bill of particulars stating the number of men employed by him and who would probably have been employed in completing the contract.

First Department, March, 1912.

[Vol. 149.]

The plaintiff should not be charged with ten dollars costs as a condition requiring the defendant to accept his bill of particulars where the bill as originally served on the defendant's demand was proper.

Where the bill of particulars served on demand was sufficient an order requiring the bill of particulars should not contain a clause precluding the plaintiff from introducing evidence of the particulars required by the order.

The plaintiff should not be charged with costs as a condition for an amendment of his complaint, if the cause of action is not changed and the amendment would have been allowed at trial if justified by the proof.

APPEAL by the plaintiff, The S. H. Pomeroy Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of November, 1911.

Appeal by the plaintiff, The S. H. Pomeroy Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of December, 1911.

Lewis R. Conklin, for the appellant.

Robert B. Knowles, for the respondent.

SCOTT, J.:

The plaintiff appeals (1) from an order requiring it to serve a bill of particulars, and (2) from an order requiring defendant, upon terms, to accept a bill of particulars and supplemental bill tendered by plaintiff, and precluding plaintiff from introducing any evidence and giving any testimony upon the trial of the action as to any facts not set forth in the bill of particulars, and also permitting plaintiff, upon terms, to amend its complaint by increasing the damages sued for.

The complaint alleges that defendant and plaintiff entered into an agreement whereby the latter was to manufacture and furnish certain articles to be used in the construction of a building; that after plaintiff had proceeded to execute the contract the defendant repudiated it and refused to carry it out. The action is for damages for the refusal to permit plaintiff to complete the contract, and the amount of damages claimed is based upon the difference between the contract price and what it

App. Div.]First Department, March, 1912.

would have cost plaintiff to complete. The allegation is that plaintiff had spent \$1,000 in fulfillment of the contract before defendant repudiated it, and that the whole cost to plaintiff of completing the contract would not have exceeded \$11,000.

With the answer defendant demanded a bill of particulars. Plaintiff attempted to comply with this demand and served a bill and amended bill. Being dissatisfied with these, defendant returned them and moved for a bill of particulars, which motion resulted in the order first appealed from. Pending the appeal from that order plaintiff served an unusually complete bill of particulars, which the defendant returned as failing to comply with the order. Upon a motion that defendant be required to accept the bill of particulars, the second order appealed from was made.

The order for the bill of particulars required plaintiff to state, among other things, the number of men employed in performing the work costing one thousand dollars actually done under the contract, and the number of men that would have been employed if plaintiff had been permitted to complete the contract. This, we think, was more than defendant was entitled to, and plaintiff's excuse for not complying with this part of the order which it incorporated into the bill of particulars seems to be entirely reasonable. The order for the bill of particulars must, therefore, be modified by striking out the requirement that the plaintiff state the number of men employed, and that probably would have been employed to complete the contract, and as so modified affirmed, with ten dollars costs and disbursements to appellant. With this provision stricken out of the first order the only colorable objection to the bill served by plaintiff is removed, and, consequently, the imposition upon plaintiff of ten dollars costs as a condition of requiring defendant to accept the bill must be stricken out. So, also, and for the same reason must the preclusion clause be stricken out, as well as for the further reason that it is too broad, and by its terms covers matters not related to the bill of particulars. The amendment of the complaint increasing the amount of damages claimed was not of a character justifying the imposition of costs as a condition. It did not change the cause of action in any way, and was an amendment which might have been

PLE EX REL. CITY OF NEW YORK v. Dickey.

[Vol 149.]

First Department, March, 1912.

the trial if the proof justified it. The second order
must, therefore, be modified by striking out all
posed upon plaintiff and also the preclusion clause.
ified is affirmed, with ten dollars costs and
pellant.

M., P. J., LAUGHLIN, CLARKE and MILLE

modified as stated in opinion and as modified af
llars costs and disbursements to appellant i
ers to be settled on notice.

LE OF THE STATE OF NEW YORK ex rel. THE CR
RK, Relator, v. WILLIAM D. DICKEY, Chairman
Commissioners under Chapter 537 of the La
Amended by Chapter 567 of the Laws of 1894,
f the Laws of 1905, and Other Acts; and U
TRUST COMPANY OF NEW YORK, as Executor
HINE L. HORTON, Deceased, Respondents.

First Department, March 22, 1912.

rporations — widening street, city of New York —
widening on grade — damages.

the widening of a street in the city of New York the land
owner was left below grade owing to the natural contour
the grade of the street itself was not changed, commiss
er the authority of chapter 537 of the Laws of 1893, as ame
uthority to award the owner substantial damages.

ARI issued out of the Supreme Court and attest
ay of June, 1911, directed to William D. Dio
and others, commissioners, etc., commanding t
and return to the office of the clerk of the count
all and singular their proceedings had in rela
of a certain claim for damages filed by the Un
t Company of New York, as executor, etc.

App. Div.] First Department, March, 1912.

Charles J. Nehrbas, for the relator.

Benjamin Trapnell, for the respondents.

SCOTT, J.:

The United States Trust Company, as executor, etc., of Josephine L. Horton, deceased, has been awarded substantial damages as for a change of grade of Franklin avenue in the city of New York. That avenue was originally laid out as a fifty-foot street, and, by a map filed in 1894, it was made a sixty-foot street, being widened ten feet on the side upon which claimant's property abutted. This ten-foot strip was acquired by the city of New York, and an award therefor made to the then owner of the property, and in 1897 the street was physically regulated and graded as a sixty-foot street upon the grade established by the map of 1894.

Claimant's property extends from Franklin avenue to Third avenue, sloping downward very decidedly toward the latter avenue, the difference between the grades of these avenues being from seventeen to twenty-two feet. In consequence of this natural contour of the land the extension of Franklin avenue ten feet towards Third avenue left that portion of claimant's land which abutted upon the widened street some seven feet below the grade of the street, which grade, however, remained substantially as it had been, the grade established by the map of 1894 differing from the physical surface as it had existed since 1871 by less than one-half a foot.

The commissioners have awarded damages upon the theory that there has been a seven-foot change of grade.

The act from which the commissioners derive authority to proceed (Laws of 1894, chap. 567, § 1, amdg. Laws of 1893, chap. 537, § 1 *et seq.*) gives them power to award damages only which have been sustained by reason of a change of grade of a street or avenue. It is manifest that in the present case the grade of Franklin avenue has not been changed except to an insignificant extent. It is true that there has been a change in the relative grades of the street and of the land abutting upon it, but this is due to the widening of the street, and not to any change in its grade, and if the claimant has suffered damage it is a result of the widening of the street,

First Department, March, 1912.

not of any change in its grade, for that remains substantially as it has always been.

It follows that the writ must be sustained and the determination of the commissioners annulled, with fifty dollars costs and disbursements.

INGRAHAM, P. J., LAUGHLIN, CLARKE and MILLER, JJ., concurred.

Writ sustained and determination of commissioners annulled, with fifty dollars costs and disbursements. Order to be settled on notice.

WILLIAM B. FRANKLIN and GEORGE ISHAM SCOTT, Respondents, v. JOSEPH LEITER, Appellant, Impleaded with JOSEPH H. HOADLEY and CYRUS FIELD JUDSON, Defendants.

First Department, March 22, 1912.

Trial — separate trial of issue — liability as partner — evidence — judicial notice.

Where judgments for the plaintiff in an action against the members of the alleged partnership have been reversed after three successive trials owing to difficulty in charging the jury properly as to whether one of the defendants was in fact a partner and for the admission of evidence incompetent against him, unless he was a partner, but competent against other defendants, the court, under the authority of section 402 of the Code of Civil Procedure, may in its discretion grant a separate trial of the issue as to whether the defendant was a partner.

The Appellate Division may act on knowledge based upon the records of former appeals of which it takes judicial notice.

Separate trial of the issue aforesaid should not be denied because a motion was not made until the case had been thrice tried, as the failure of the former trials justified the motion.

APPEAL by the defendant, Joseph Leiter, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of February, 1912, denying the said defendant's motion for a separate trial of the issues as to his partners with the other defendants.

App. Div.]First Department, March, 1912.

Charles Thaddeus Terry, for the appellant.

Edmund L. Mooney, for the respondents.

SCOTT, J.:

The action is to recover losses sustained by plaintiff as the broker of a pool or partnership, said to have been composed of appellant, Joseph H. Hoadley and Cyrus Field Judson, which was engaged in the year 1902 in dealing speculatively in a certain stock. A sharply contested issue in the case is whether or not appellant was in fact a partner or coadventurer with the other defendants and, therefore, liable as principal for the orders given by them.

The action has been tried three times and has each time resulted in a judgment against all the defendants, and each judgment has been reversed in this court. (See *Franklin v. Hoadley*, 115 App. Div. 538; 126 id. 687; 145 id. 228.) Each trial has taken a considerable time and the greatest difficulty has been found in so instructing the jury and qualifying the admission of evidence, competent against Hoadley but incompetent against appellant unless he was a partner, as to fairly try the question of partnership.

The appellant's motion for a separate trial of the question whether or not he was a partner is made under section 967 of the Code of Civil Procedure, which gives sufficient authority for the motion if in the discretion of this court it should be granted. (*National Exchange Bank v. McFarlan*, 13 N. Y. Supp. 202; memo. rep., 59 Hun, 618.) While we scarcely share in appellant's optimistic belief that the trial of this issue will be very brief, still we consider that in the interests of justice the motion should have been granted. From our knowledge of the case, based upon our own records of the former appeals, of which we may take judicial notice, we are persuaded that it will be very difficult, if not almost impossible, to arrive at a satisfactory and just result by continued attempts to try the cause upon the lines which have heretofore prevailed. At all events the determination as to appellant's liability as a copartner should go far to shorten and simplify the trial of the remaining issues in the case. Under the circumstances it is not a valid objection to the motion that it was not made until after the cause had been

JOHNSON SERVICE CO. v. HILDEBRAND.

First Department, March, 1912.

[VOL 149.]

tried. It is the very fact of these three futile efforts to
all the issues together which justifies the motion.
The order appealed from must be reversed, with ten dollars
and disbursements, and the motion granted.

GRAHAM, P. J., LAUGHLIN, CLARKE and MILLER, JJ.,
urred.

der reversed, with ten dollars costs and disbursements,
motion granted. Order to be settled on notice.

SON SERVICE COMPANY, Respondent, v. GEORGE HILDE-
AND and NATIONAL SURETY COMPANY, Appellants,
pleaded with THE BABCOCK & WILCOX COMPANY, Respond-
, and THE CITY OF NEW YORK and Others, Defendant.

First Department, March 15, 1912.

anic's lien — when suit of foreclosure may be commenced
action by sub-contractor — appeal — inconsistent findings.

ot essential that the entire amount earned by a lienor shall be
payable at the time his suit to foreclose the lien is commenced
it is essential that some part thereof shall be then due and payable
contractor, having entered into an agreement with a city to erect a
building, sub-let part of the work to another contractor, who sub-
lets thereof to two others. In a suit by the latter sub-contractor
to foreclose their liens it appeared from the agreement of the
principal contractor and from the evidence that at the time of the
commencement of the action there was nothing due from him to
contractor.

that as the plaintiffs stand in the shoes of the first sub-contractor
there was no amount due them, and the suit was prematurely brought.
The findings are inconsistent the appellant is entitled to have
the appeal decided on the basis of those findings which are most favorable
to him.

PEAL by the defendants, George Hildebrand and another
of a judgment of the Supreme Court in favor of the plaintiff
and the defendant The Babcock & Wilcox Company, rendered
in the office of the clerk of the county of New York
on the 26th day of April, 1911, upon the decision of the court
after a trial at the New York Special Term.

App. Div.]First Department, March, 1912.

M. Carl Levine, for the appellants.

J. Power Donellan, for the plaintiff, respondent.

LAUGHLIN, J.:

This is an action to foreclose a municipal lien. On the 25th day of June, 1907, the appellant Hildebrand entered into a contract with the city for the erection of a public bath building in the borough of Brooklyn, pursuant to certain plans and specifications, for the gross sum of \$165,480. On the 10th day of February, 1908, he sublet the furnishing of materials and the work required in heating and ventilating the building to the defendant R. J. Sovereign Company, Inc., for the gross sum of \$21,000; and on the thirteenth day of the same month the Sovereign Company in turn sublet the furnishing and installation of the Johnson system of temperature regulation to the plaintiff, for the gross sum of \$734, "less 10%." The judgment awards the balance of \$868.50 due from Hildebrand to the Sovereign Company to the plaintiff to the extent of \$756.93 in payment of the balance due on its claim against the Sovereign Company, and the balance to the Babcock & Wilcox Company, which was also a sub-contractor of the Sovereign Company for the installation of two Babcock & Wilcox patent steam boilers, for which there remained due from the Sovereign Company \$1,000, for which the Babcock & Wilcox Company had filed a lien. The liens of the plaintiff and of the Babcock & Wilcox Company were discharged by Hildebrand's filing an undertaking with the appellant surety company as surety. Hildebrand and the surety company are the sole appellants, and their contentions are the same.

The appellants contend at the outset that the action was prematurely brought, in that there was nothing due or owing from Hildebrand to the Sovereign Company at the time it was commenced. The contract between Hildebrand and the Sovereign Company provided for the payment of eighty-five per cent of the contract price of the work as it progressed, and that the last payment should be the remaining fifteen per cent, which should not be payable until the work was completed and accepted by Hildebrand and until he received his final payment from the city. The Sovereign Company with the consent of

First Department, March, 1912.[VOL. 149.]

Hildebrand abandoned its contract before completion, and thereupon its contract was modified so as to provide that only five per cent of the contract price should be retained by Hildebrand for final payment. The court has found that this final payment of five per cent was not to be made by Hildebrand until the Sovereign Company's work was completed and accepted by him and until he received his final payment on his contract with the city. The final payment was not made to Hildebrand by the city until the 21st day of February, 1910, and it aggregated \$28,727.54. The action was commenced on September 2, 1909. It is not essential that the entire amount earned by a lienor shall be due and payable at the time his action to foreclose the lien is commenced, but it is essential that some part thereof shall be then due and payable. (*Preusser v. Florence*, 4 Abb. N. C. 136; *Beecher v. Schuback*, 4 Misc. Rep. 54; *Ringle v. Wallis Iron Works*, 85 Hun, 279; affd. on opinion below, 155 N. Y. 675; *Firth v. Rehfeldt*, 30 App. Div. 326; affd., 164 N. Y. 588; *Palmer Lumber Co. v. Stern*, 140 App. Div. 680.) If, therefore, there was no amount due and payable from Hildebrand to the Sovereign Company at the time this action was commenced, since its sub-contractors stand in its shoes, there was no amount due to them (*Brainard v. County of Kings*, 155 N. Y. 538; *Van Clief v. Van Vechten*, 130 id. 571; *Campbell v. Coon*, 149 id. 556; *Wexler v. Rust*, 144 App. Div. 296), it was prematurely brought and the recovery cannot be sustained.

The final payment from Hildebrand to the Sovereign Company, under the contract as modified, was to be the sum of \$1,050. The Sovereign Company abandoned its contract in May, 1909. At that time there remained a balance unpaid on its contract of \$1,568.50. The contract between the Sovereign Company and Hildebrand provided that, upon its failure to furnish sufficient labor and materials, Hildebrand might upon three days' notice procure the same and "charge and deduct the cost thereof from the amount due the sub-contractor under this present agreement, and to collect the deficiency, if any, from the sub-contractor." On the abandonment of the work by the Sovereign Company, Hildebrand took charge and completed it. By the judgment the court has allowed him the

App. Div.]First Department, March, 1912.

sum of \$700 for thus completing it, and has awarded the balance of the \$1,568.50, being \$868.50, to the plaintiff and the Babcock & Wilcox Company as already stated. The appellants contend that it has not been shown that there was any balance due from appellant Hildebrand to the Sovereign Company, to which the liens of respondents could attach for the reason that the evidence does not show the *actual cost* of completing the work left undone by the Sovereign Company, and that the finding that appellant Hildebrand completed it at a cost of \$700 is without support in the evidence, and is inconsistent with the finding, made at his request, to the effect that the evidence does not show the amount of money "necessarily expended" by him in completing the work. Where findings are inconsistent the appellant is entitled to have the appeal decided on the basis of those findings which are most favorable to him. On that theory appellants claim that there should be a reversal, because, since the cost of completing the work has not been shown, there is no basis upon which to determine the amount owing to the Sovereign Company. If we should decide the appeal on that theory, it would only result in a new trial, which we think would be of no avail to appellants for the actual cost could then be shown and it probably would not exceed \$700.

The president of the Sovereign Company testified at one point that his company completed its contract with the exception of furnishing and installing the electric fan to operate the blower, the motor, electric wiring and switchboard, and that appellant Hildebrand did this work. He was then asked the fair market value of the work done by appellant Hildebrand in completing the contract, and he answered that the fair market value was between \$700 and \$800; and he further testified, in effect, that his company abandoned the work pursuant to an arrangement made at his suggestion, with appellant Hildebrand, that the latter should give his company three days' notice pursuant to the contract, which his company would accept, "and he could finish the job at the price agreed on, between seven and eight hundred dollars, and the balance would be paid to my lienors, creditors. That was all arranged and agreed upon. He said he agreed with me on the facts of

First Department, March, 1912.

[Vol. 149.]

the case; and I told him how much money was coming to me and what he would have left over; * * * and he agreed with me on the price and terms and everything was satisfactory between him and I;" and that he informed Hildebrand with respect to the work remaining unperformed under the contract, and stated to him that it would cost between \$700 and \$800 to perform it, and appellant Hildebrand agreed that he would finish it, and said that the \$700 or \$800 would cover the cost of finishing. I am of opinion that this evidence fairly warranted the finding that the cost of finishing the work was at least \$700, the amount which the trial court allowed therefor, and that brings the balance unpaid to the Sovereign Company below the five per cent, and it becomes unnecessary to determine whether, as appellants contend, the court should have found such cost to be a greater sum. On the abandonment of the contract by the Sovereign Company, appellant Hildebrand was at liberty to complete the work and charge the cost thereof to it, and the fact that the amount was agreed upon, if it was the reasonable cost, does not affect the rights of the parties. The consideration was the voluntary abandonment of the contract by the Sovereign Company on that condition. This left a balance owing to the Sovereign Company from appellant Hildebrand of less than the remaining five per cent, and, by the express terms of the contract, that did not become due and payable from appellant Hildebrand to the Sovereign Company until the final payment was made to him by the city.

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellants to abide the event.

INGRAHAM, P. J., McLAUGHLIN, MILLER and DOWLING, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellants to abide event.

App. Div.]First Department, March, 1912.

**KNICKERBOCKER TRUST COMPANY, Appellant, Respondent, v.
ANDREW MILLER, Respondent, Appellant.**

First Department, March 8, 1912.

Pleading — bill of particulars — bills and notes — action against payee as indorser — lack of diligence in presenting check for payment — burden of proof — bill of particulars denied.

A bank which has received a check drawn on another bank and has credited the amount to the account of the payee who withdrew the same, and which seeks to hold the payee as an indorser after the dishonor and protest of the check is under the burden of showing presentation of the check to the drawee within a reasonable time.

Hence, the answer of such indorser alleging that the plaintiff did not use due diligence in presenting the check for payment raises no new issue, and he will not be compelled to give a bill of particulars of the defendant's lack of diligence or to make his answer more definite and certain in that respect.

CROSS-APPEALS by the plaintiff, Knickerbocker Trust Company, and the defendant, Andrew Miller, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of December, 1911, granting the plaintiff's motion for a bill of particulars.

Charles H. Tuttle, for the plaintiff.

Enos Throop Geer, for the defendant.

LAUGHLIN, J.:

This action is brought to recover the amount of a check drawn by the firm of Lathrop, Haskins & Co. upon the National City Bank to the order of the defendant, which he indorsed and deposited to his credit in his drawing account with the plaintiff, and which was subsequently dishonored. On the same day, and before the close of banking hours, plaintiff indorsed and transferred the check to the National Bank of Commerce, which presented it to the City National Bank for payment at about ten o'clock in the forenoon the next day. Payment was refused on the ground that the drawer's account was not good for any part of the amount. The check was

First Department, March, 1912.

protested in due form. In the meantime the defendant withdrew the amount thus credited to his account. Plaintiff put in issue the allegations of the complaint relating to the presentation of the check for payment, and plaintiff did not use due diligence in failing to present it within a reasonable time, and the indorsees and holders of the check subsequently thereto did not use diligence in presenting it for payment, not so present it within a reasonable time, whereupon thereof was lost to him and he was discharged from liability. Plaintiff moved for relief in the alternative, alleging with respect to its failure and that of the other indorsees of the check to present it within a reasonable time, that the same be made more definite and certain, or that the defendant give a bill of particulars of his claim in that regard. The court declined to require that the pleading be more definite and certain, but granted the motion for a bill of particulars. The defendant thereupon appealed from the order granting one alternative of the application; and the other alternative plaintiff appealed without naming itself in the event that it should be determined that plaintiff was entitled to have the allegations made more definite and certain, but not a bill of particulars. Plaintiff claims that he has a right to withdraw the money, and seeks now to have the burden of showing that he did not present the check within a reasonable time before it is paid. (Daniels Neg. Inst. § 669a; *Jaffray v. Knickerbocker Trust Co.*) No new issue was presented by the allegations of the complaint with respect to the failure of the plaintiff and the other indorsees to present the check for payment within a reasonable time. If the facts are undisputed, the question whether or not the check was presented for payment within a reasonable time will become a question of law for the court to determine, and if they should be controverted it may be necessary for the jury to determine the facts and apply the law as given by the court. We are of opinion, therefore, that plaintiff was not entitled to relief upon either theory. Plaintiff's contention that the order, in so far as it is appealed from,

App. Div.] First Department, March, 1912.

the plaintiff, should be affirmed, and in so far as it is appealed from by the defendant, it should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, McLAUGHLIN, SCOTT and DOWLING, JJ., concurred.

On defendant's appeal, order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and on plaintiff's appeal, order affirmed.

GILBERT H. MONTAGUE, as Receiver of HOTEL GOTHAM COMPANY, Respondent, v. HOTEL GOTHAM COMPANY, Defendant, Impleaded with HENRY L. GOODWIN, Appellant.

First Department, March 8, 1912.

Corporation — action to recover money paid to officer in violation of section 66 of the Stock Corporation Law — allowance to officer for rent and board — amendment of pleading.

Where a hotel company has failed to pay certain installments of rent due under its lease, a subsequent payment to its president for services as manager is a violation of section 66 of the Stock Corporation Law, prohibiting transfers of property to officers or stockholders of a company after it has failed to pay its debts, and the amount so paid may be recovered in an action by the receiver of the company.

But in such an action it is proper to allow the president a certain amount for the rent of rooms and board to which he was entitled under his agreement for services, and such amount, having been returned, may be deducted from the recovery.

Where parties by mutual consent, in effect, modify the pleadings on the trial, they are bound thereby on appeal.

APPEAL by the defendant, Henry L. Goodwin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of May, 1910, upon the decision of the court rendered after a trial at the New York Special Term.

Alexander S. Andrews, for the appellant.

John Thomas Smith [Edward A. Craighill, Jr., and C. W. Gormly with him on the brief], for the respondent.

First Department, March, 1912.

LIN, J.:

action is brought to recover the sum of \$5,000, paid to appellant Goodwin by the Hotel Gotham Company on the 1st of May, 1908, on the ground that prior to that time company had failed to pay certain installments of rent its landlord under a lease in writing, and constituted a transfer of property to a ~~agent~~ or director of the company for the ~~payment~~ ~~badness~~ due to him from it and was ~~prohibited~~ by the provisions of section 48 of the Stock Corporation Law (chap. 36 [Laws of 1892, chap. 688], as amended by chap. 354), which were re-enacted by section 1 of the Corporation Law (Consol. Laws, chap. 59; § 1), and which, so far as deemed material follows: "No corporation which shall have issued any of its notes or other obligations, when due, to any of the United States, nor any of its officers or employees, shall transfer any of its property to any of its officers or shareholders, directly or indirectly, for the payment of any such obligation upon any other consideration than the original property paid in cash."

Appellant was the president of the hotel company, employed by the board of directors to act as manager of the hotel, and the payment was made for services rendered in his employment. We agree with the learned counsel for the plaintiff upon the theory upon which the case was tried. According to the theory presented upon the appeal, the payment was made in violation of the statute. There is evidence in the record which affords ground for the contention that the Hotel Gotham Company was operating the hotel as agent of its shareholders, and that the payment to appellant by the Gotham Hotel was made by it as agent of the Fifty-fifth Street Hotel, but since that point is not taken by appellant we do not consider thereon. We are of opinion, however, that in view of the theory that the Hotel Gotham Company was operating the hotel in its own right, the recovery against appellant is justified. It is true that he admitted by his answer that he received the \$5,000 to his own use; but upon the trial he was allowed, without objection and exception, to give evidence

App. Div.]

First Department, March, 1912.

ing to prove that on or about the same day he returned to the company \$1,100 of the \$5,000 for rent of rooms occupied by his family and himself and for their board during the time he was living at the hotel as manager, and that under the agreement by which he was employed he was entitled to the free use of the rooms and to board and to the \$5,000 in addition thereto. This evidence was not controverted. The learned counsel for the respondent contends that the appellant was not entitled to a deduction on account of this payment for the reason that he did not plead the fact. The parties by mutual consent, in effect, modified the pleadings and, therefore, the rights of the appellant must be determined on the appeal as if the answer had been duly amended. Moreover, if, as the evidence tends to show, it was contemplated by the appellant's employment that he should not be charged for such accommodations and board it would not have been a violation of the statute to have allowed him the use of rooms and the board; and if that were the agreement there could have been no recovery by the receiver of the hotel company therefor under the statute in question if appellant had not paid over the money. We cannot, therefore, adopt respondent's theory that the appellant should be left to present his claim to the receiver for the payment made under a mistake or misapprehension, either with respect to the law or the facts.

The findings are insufficient to warrant this court in modifying the judgment and, therefore, it should be reversed and a new trial granted, with costs to appellant to abide the event, unless the respondent stipulates to reduce the recovery by the sum of \$1,100, and interest thereon from said 8th day of May, 1908, and if so stipulated the judgment is modified accordingly and affirmed, without costs to either party.

INGRAHAM, P. J., McLAUGHLIN, MILLER and DOWLING, JJ., concurred.

Judgment reversed and new trial granted, with costs to appellant to abide event, unless respondent stipulates to reduce judgment as stated in opinion, in which event judgment as modified affirmed, without costs. Order to be settled on notice.

First Department, March, 1912.

In the Matter of the Application of CHARLES H. DUELL, Appellant, for an Order to Review the Decision of the BOARD OF ELECTIONS OF THE CITY OF NEW YORK, Respondent, and Fixing the Order of Candidates for Party Positions on the Republican Primary Ballot to Be Voted for at the Primary to Be Held March 26, 1912.

First Department, March 15, 1912.

Election Law — primary election — order on ballot of names of candidates for delegates to national convention — power of court to interfere.

Since there is no direction in the Election Law as to the order in which names of candidates for delegates to the National convention shall be placed upon the ballot, the court has no power to interfere with the acts of the boards of elections.

LAUGHLIN and DOWLING, JJ., dissented, with opinions.

APPEAL by the petitioner, Charles H. Duell, from an order of the Supreme Court, made at the New York Special Term, entered in the office of the clerk of the county of New York, on the 13th day of March, 1912, denying the petition herein.

William M. Bennett, for the appellant.

Terence Farley, for the respondent.

INGRAHAM, P. J.:

The majority of the court is of the opinion that the direction contained in the Election Law as to the order in which names of candidates for delegates to the National convention shall be placed upon the ballot; and that there being no direction as to the position in which these names should appear on the ballot, the acts of the board of elections did not violate the statute, and, therefore, the court has no power to interfere.

For this reason we think the court has not the power to reverse the action of the board of elections, and the order appealed from should be affirmed.

McLAUGHLIN and MILLER, JJ., concurred; LAUGHLIN and DOWLING, JJ., dissented.

First Department, March, 1912.

App. Div.]

MATTER OF DUELL.
First Department, March, 1911

RUGHLIN, J. (dissenting):

CHLIN, J. (dissenting):

I dissent from the decision and am of opinion that the names of the delegates to the National convention should be printed at the head of the primary ballot. The primary election to be held on the twenty-sixth of the present month is expressly declared by section 53 of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as added by Laws of 1911, chap. 891, and amd. by Laws of 1912, chap. 4) to be for the purpose of choosing delegates and alternates to the National convention, to nominate candidates of the respective parties for the office of President and Vice-president of the United States. Incident to that main purpose of the presidential primary, the Legislature by a recent amendment of the statute has authorized the electors of each party to elect members of their respective party organizations at the same time. The board of elections, instead of recognizing and following the provisions of the law declaring this spring primary to be for the purpose of choosing delegates to the National conventions, thus making it a presidential primary, appears to have deliberately planned to make it a primary for the election, not of delegates to the National convention and to the State convention to elect delegates to the National convention, but of members of the party organization to appear at the primary and discover upon the ballot the names of the candidates for election as delegates to the National convention by direct vote of the people. They have preceded the names of the candidates for members of party committees, and they have followed them by candidates for members of other party committees. They have not afforded the delegates to the National convention by candidates for members of other party committees an opportunity to discover the names of the delegates to the National convention, either at the head or the foot of the ballot. It is, however, provided in that section with respect to the ballot for the fall primary that the names of the delegates shall precede on the official ballot the names of the candidates for nomination to public office and for election.

candidates for election as members of party committees. Thus Legislature recognized that candidates for delegates, even State convention to nominate State officers, should have precedence on the ballot over candidates for membership on party committees; but the order for the ballot now under review gives greater dignity to party, Congressional and city committees than to the position of delegate to the national convention. The board of elections, by under review, has determined that membership in party organizations is of more importance and constitutes proper nominations for the office of President and Vice-President of the United States, and candidates for delegates to the National convention have accordingly been subordinated to candidates for membership on party committees, county, executive, borough, aldermanic and Municipal Court committees. It is not even pretended that there is any reason in the law or reason or justification for thus arranging the names on the ballot; nor is any suggestion offered as to why it happens that candidates for members of four party committees have been subordinated to candidates for delegates to the National convention, thus placing them in the official ballot between candidates for members of party committees. The mere statement of the facts, without argument, shows that if discretion is vested in the board of elections with respect to preparing the form of the printed ballot, it has been so abused that the action taken by the board should be annulled, for it shows a deliberate attempt to confuse the voters and to render it most difficult, if not impossible, for them to vote intelligently and to have their votes counted. I am of opinion, however, that the board of elections had no discretion in the premises. The Legislature in section 53 of the Election Law, having made the provisions of section 58 thereof applicable to the election of delegates to the National convention, it necessarily follows, I think, that in making a provision for the election of delegates, as distinguished from members of a party committee, the names of such delegates should either precede or follow the names of delegates to the State convention. The only room for doubt is as to whether they should precede or follow on the ballot the names of delegates to the State convention.

App. Div.] First Department, March, 1912.

convention. The only discretion given to the board with respect to the order of names on the ballot is concerning the candidates for membership on *certain party committees*. I find nothing in the statute to indicate that the Legislature intended to leave any discretion to the board with respect to the place on the official ballot of the names of candidates for public office, or for delegates to any convention. The fair and reasonable construction of the statute, in view of the fact that on the official ballot the presidential electors precede all other names, requires that the names of the delegates to the National convention shall appear at the head of the ballot, and that their place should not be subordinated, even to delegates to the State convention to nominate other delegates to the National convention. By fair analogy from other statutory provisions, by which the positions on the official ballot for the presidential and annual elections, and on the official primary ballot as well, are arranged to give precedence, as far as may be, according to the rank and dignity of the office and position, I am of opinion that the names of the *delegates*, commissioned by direct vote of the people to record their will in the National convention, should precede the names of *delegates* to the State convention, who are to *represent* the people, not in the National convention, but in electing other delegates thereto.

The provisions of section 56 of the Election Law (as added by Laws of 1911, chap. 891), in my opinion, clearly authorize the court to review the action of the board of elections, and being of opinion that the action of the board now under review is a plain, deliberate violation of the statute, and an attempt to thwart the will of the people, I vote for reversal and for an order commanding the board of elections to place at the head of the ballot the names of candidates for election as delegates to the National convention.

DOWLING, J. (dissenting):

I dissent, although on different grounds than those given by my brother LAUGHLIN. Under section 53 of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as added by Laws of 1911, chap. 891, and amd. by Laws of 1912, chap. 4) provision is made for a primary election of delegates to the

First Department, March, 1912.

National convention to be held on the last *Tuesday in March*. Either provision must be made for such delegates upon a single official ballot, which shall include all other persons to be voted for, or they must be elected upon a separate ballot. As there is but a single ballot provided for, it seems to me that section 3 (as added by Laws of 1911, chap. 891) suggests the arrangement of the names thereon in a logical order. It enumerates three classes of places to be filled:

1. Candidates for specific offices.
2. Delegates to conventions.
3. Members of committees.

No specific provision has been made for the delegates to the national convention. The only discretion vested in the board of elections is as to the order in which committees shall appear. The election of National delegates being specifically provided for at this March primary, and their place not having been designated, either they should have a separate ballot, or else to appear on the same ballot as the other persons chosen then the proper place is second upon the ballot of delegates to the State convention, who by the provisions now are to follow the names of individual candidates as specified by section 58.

Order affirmed.

AMES TALCOTT, Appellant, v. STANDARD OIL COMP.

WILLIAM S. BLAKSLEE, Respondents.

First Department, March 22, 1912.

orporation — certificate of stock not negotiable instrument. — Assignment of certificate — action to recover possession of stock arising loan thereon — estoppel of owner from denying acts of a rights of bona fide transferee.

certificate of stock is not a negotiable instrument.

n assignment of a certificate of stock with a power of attorney inscribed upon the back of the certificate, although in blank, except as to signature and witness, presents such indicia of title that an innocent transferee obtains good title.

the assignment and power, though upon a separate paper, identifying description the property intended to be assigned, the same rule applies. Plaintiff, a banker, loaned his brokers a certain sum on twenty-

App. Div.]

First Department, March, 1912.

shares of stock of the Standard Oil Company and received the usual collateral stock note. Subsequently, the brokers being unable to repay the loan, plaintiff sought to have the stock transferred to him in order that he might realize thereon as collateral and, discovering that one B. claimed title, brought action against said company and the said B., praying that he be adjudged the owner of the stock. It appeared from the evidence that B. delivered the certificates of stock in question to one R., his brother-in-law, as security to him for the purchase of certain stock, although without any power to transfer or deal with it; that an assignment and power of attorney had been delivered to R. three years before for a different purpose; that when R. was suddenly called upon by his brokers he took the certificate of stock, pinned the transfer to it, and forwarded it to the plaintiff's brokers with the agreement that they should use it as collateral in securing a loan and they secured the loan from plaintiff. Held, that plaintiff should be awarded the ownership of the stock and that the defendant B. should seek his remedy against R., his agent, whose acts he is precluded from disputing. An agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a bona fide transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal. LAUGHLIN and MILLER, JJ., dissented, the latter with opinion.

APPEAL by the plaintiff, James Talcott, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the Clerk of the county of New York on the 9th day of March, 1911, upon the decision of the court rendered after trial at the New York Special Term.

Edward W. Harris of counsel [Robert D. Ireland with him on the brief], **Harris & Harris**, attorneys, for the appellant. **Frederic R. Kellogg** of counsel [Chester O. Swain with him on the brief], **Kellogg & Emery**, attorneys, for the respondent Blakslee.

Clarke, J.:

Plaintiff, claiming to be the owner of twenty-five shares of capital stock of the Standard Oil Company standing in the name of the defendant William S. Blakslee, brought this action against the said company and the said Blakslee praying that

First Department, March, 1912.

be adjudged the owner, that the claim of the latter to any interest in the stock be dismissed as unfounded, and that the defendant company be required to transfer the stock to plaintiff its books.

The position of the company is that of a mere stakeholder. Special Term has held that the defendant Blakslee is the owner of the said certificate; that the plaintiff has no right, title or interest therein; that he be directed to forthwith tender and deliver the same to the defendant Blakslee and the complaint be dismissed upon the merits, with costs to one of the defendants. From said judgment plaintiff appeals.

The plaintiff is a banker and commission merchant in New York. William E. Nichols & Co. were

creditors to whom the plaintiff had been making loans

On November 8, 1907, Nichols & Co. called plaintiff on the telephone and asked if he would make twenty-five shares of the capital stock of the Standard Oil Company to the extent of seventy-five per cent of the value thereof, which plaintiff agreed to do. Accor-

dingly Mr. Talcott loaned \$7,500 to Nichols & Co., with

to him the usual collateral stock note bearing

reading in part as follows: "On demand, after

we received, we hereby promise to pay to James Talcott, at —— seventy-five hundred dollars, with

the rate of — per cent per annum until paid,

sited herewith, as collateral security, for the payment of the note, and also as collateral security, for all other future demands of any and all kinds of the holder

against the undersigned due or not due, the following property:

25 Standard Oil, \$10,000;" and delivered at the

a certificate of the Standard Oil Company for twenty-five shares made out in the name of W. S. Blakslee. Pi-

cto, accompanying therewith, and delivered at the

, was an assignment and irrevocable power of attorney

for the stock. That is, neither the name of the assignee nor

description of the property assigned was entered in the body of the instrument.

This was signed as follows: "In witness

hereof, I have hereunto set my hand and seal the 18th day of

September, one thousand nine hundred and seven, W. S. Blak-

App. Div.]

First Department, March, 1912.

(L. S.) Signed, sealed and delivered in presence of W. A. Ashbaugh. Signature guaranteed, Wm. E. Nichols & Co."

Previous to Mr. Talcott's loan and on the 18th of October, 1907, the Empire Trust Company of the City of New York had loaned William E. Nichols & Co. the same amount, \$7,500, on the same certificate of stock, accompanied by the same assignment and power of attorney, and before delivering the assignment with stock power to the Empire Trust Company, Nichols & Co. on October eighteenth guaranteed the signature of Blakslee. When the Empire Trust Company made its loan on October eighteenth, the certificate and stock power were in exactly the same form as when Talcott made his loan on November eighth. It was because the trust company had called its loan that the transaction with Talcott was had.

During the several years previous to this transaction in which Mr. Talcott had had dealings with Nichols & Co., loaning them sums of money from time to time, he had always received stock certificates as collateral security. At the time this loan was made Nichols & Co. owed him between \$30,000 and \$40,000. On January 27, 1908, they owed him \$30,935 including the loan of \$7,500 made November 8, 1907, and on that day they gave Talcott a new note for the entire indebtedness, the Standard Oil stock in question continuing as collateral security for said note and Talcott being unaware that Blakslee had any interest in the stock in question.

Nichols & Co. came into possession of this certificate and its accompanying assignment in the following manner: John V. Ritts, who was and had been for twenty years the vice-president of the Butler County National Bank of Butler, Pa., had for some time been dealing in stocks with William E. Nichols & Co. On October 18, 1907, they had bought for his account 3,000 shares of Greene-Cananea, a mining stock costing about \$21,000, and 1,000 shares of Nipissing, costing about \$9 or \$10 a share.

Mr. Ritts testified that previous to the purchase of these stocks he had had cash settlements with Nichols & Co., who drew on him with the stocks attached to the drafts, but on this transaction he found it inconvenient to take up the stocks as he had done previously. Nichols & Co., having made this pur-

First Department, March, 1912.

[Vol. 149.]

chase for Ritts, were themselves having trouble in taking care of these stocks. It was during the panic of 1907. Ritts testified: "They [Nichols & Co.] had telegraphed or telephoned me, I don't remember which, that they would have to have money to take up these stocks or collateral. That message came to me at Butler. We were having a run on our banks at Butler at the time. I was very busy. I was just preparing to go to Pittsburgh and I went to my box and got a number of stocks from the box and I mailed from Pittsburgh, if I remember rightly, this Standard Oil certificate of stock. * * * The power of attorney I put with the stock, that is my recollection. I put it in the envelope. * * * I registered that stock from Pittsburgh and I then went back to Butler. I found there a further message from New York saying in very strong terms that hell was to pay down in Wall Street and I had better come on and take up my stocks. I came to New York that night. I reached the office of William E. Nichols & Co. on the next morning about 10 o'clock, I think. I had other collateral, other certificates of stock with me in my possession. * * * I had a discussion as to the use of those other certificates of stock for the purpose of facilitating the raising of money. Some of them were acceptable to William E. Nichols & Co.; some of them were not acceptable. There were some of them that they knew nothing about. I took them all back with me when I returned home."

He also testified to a conversation with a member of the firm as to obtaining a loan on the Standard Oil stock which they already had in their possession. "Q. Was anything said about the amount which was to be borrowed on that stock? A. There was to be borrowed enough money to take care of the stocks that were coming in and had already come in on my account." As a result of this conversation Nichols & Co. secured the loan of \$7,500 first from the Empire Trust Company and then from Talcott, as above stated.

In the summer of 1909 Nichols & Co. being unable to pay their indebtedness, Talcott sought to have these twenty-five shares of stock transferred to himself in order to realize on the stock as collateral. The Standard Oil officers examined the transfer and asked that a letter be procured from William E.

App. Div.]First Department, March, 1912.

Nichols & Co. that the stock certificate and stock power came together when they were received by Nichols & Co. Such letter was procured stating that they were pinned together when received and on August 19, 1909, the certificate of stock, stock power and letter were again presented to the officers of the Standard Oil Company, who thereupon exhibited a letter from defendant Blakslee, in which he claimed to be the owner, and notified the Standard Oil Company not to transfer the stock. In view of this letter the company declined to transfer, whereupon this suit was brought.

To avoid the effect of the delivery of the certificate of stock, the assignment and power to Nichols & Co., and the transactions hereinbefore set forth, and to deprive the plaintiff of all right, title and interest in and to the stock which had been delivered to him as collateral security for a loan of \$7,500, the defendant Blakslee presented this remarkable story: That he was the brother-in-law of Ritts, who had married his sister; that they have adjoining houses in Butler, and have always been on the most friendly terms; that while Ritts was the vice-president and the chief executive officer of the Butler County National Bank, Blakslee was the assistant cashier, and that they were together daily during banking hours in the bank; that he had the highest respect for Mr. Ritts as a man of integrity and honor; that Mr. Ritts was a man of large means, considerably larger than Blakslee's.

Mr. Ritts testified in regard to the delivery to him of the certificate of stock as follows: "Some time during August, I think it was, 1907, when the panic was on and stocks were tumbling, Mr. Blakslee, who was talking about buying an automobile, said, 'if I could make a little turn, I believe that I would buy an automobile.' I says: 'I am going to buy some Greene-Cananea; I feel that if you buy a thousand shares of Greene-Cananea that inside of a year's time you will have made enough money to buy an automobile.' 'Well,' he says, 'I am very glad to make some money, but,' he says, 'I have done pretty well on — naming some other stock then, naming Standard Steel Car stock — and I have a notion to put that up and borrow some money out of the bank; I have not got enough money to pay for an automobile,' something to that effect; and

First Department, March, 1912.

" Well, what do you say, Will, shall I buy you some ? " he says: " Yes." I says: " I am going to buy some." He says: " All right." I says: " How much shall I buy for you ? " says: " Buy a thousand shares for me." And we spoke of price, which was then about seven or eight dollars at that time. The Standard Oil certificate was delivered to Ritts two weeks before Greene-Cananea was bought. Mr. Blakslee did not have it out of his private box and handed it to Mr. Ritts, who put it in his private box, to which Mr. Blakslee did not have access. Ritts testified: " That was security for me in a measure, it was not security in the proper term of security. I said to him: ' Now you give me something to hold in this matter, I will buy that stock at the right time.' * * * I handed me this certificate of Standard Oil stock whether that would be sufficient, and I said that I thought it might." " When I bought the stock I intended that I would give it to Mr. Blakslee one thousand shares of it, and the rest to myself." " Two thousand shares was mine and one thousand shares was Mr. Blakslee's. It was intended for him to be delivered to him, but Mr. Blakslee did not know that it was his stock; he didn't know that I had bought it. * * * The matter of buying the stock was my responsibility on my part; if I had bought the stock for myself and naturally have expected I would buy some for him. In fact, he would have concluded that, in my judgment, it was the thing for me to do and that I had concluded it would buy it for him. That is the situation. * * * I am not offering one thousand shares to him and expected it." After delivering the certificate to Mr. Ritts, Mr. Blakslee said he never inquired about the certificate and asked no questions about it for the period of two years, or until A. and although it was delivered to cover the purchase of the shares of Greene-Cananea, out of the profits of which he intended to be able to purchase an automobile, he testified that he never asked him for the thousand shares of Greene-Cananea or asked him at all during this whole time."

In regard to the assignment and power, Blakslee testified that it was given by him to Ritts in the year 1904 to trans-

some shares of stock of the Butler County Bank; that Ritts, having received the stock power, put it in his private box and kept it there continuously until he sent it to Nichols & Co. Blakslee knew it was in Ritts' private safe, but said he forgot about the stock power being in Ritts' possession when he delivered to him the certificate of Standard Oil stock in 1907, and that in pledging said stock, accompanied by this power of attorney, Ritts "did something that he hadn't a right to do;" that he did not think Ritts committed a fraud on him; that he did not know whether Ritts "did just right or not;" that Ritts did "not intentionally" do wrong.

Ritts testified that when he gave the transfer to William E. Nichols & Co. he did not mean it to be a trap for the bank, but that he meant it to be a genuine, sufficient stock power to get a loan.

Mr. Ritts testified that he himself was a man held in the highest esteem in Butler by all his acquaintances, and thousand dollars he would not sacrifice that reputation and his sense of honor. When he sent the stock on to William E. Nichols & Co. he did not stop to think whether he was doing a thing he had a right to do. "Q. And you have not any sense of wrongdoing in connection with that transaction whatever, have you? A. It was wrong, there is no question about that. It was a wrong thing, my having put up this stock as collateral. Q. But you have no sense of moral obliquity in reference to the matter, your conscience does not hurt you? A. Well, only that I realize if I had done a wrong thing I would have simply to go into the market and buy the stock and return it to him. * * * Q. Even assuming that you did improperly take this stock, you can make good to him to-day, can't you? A. I would expect to make good to Mr. Blakslee his stock if I did not return it. Q. If he has any claim against you? A. Well, he has a claim for 25 shares of Standard Oil stock. Q. You are abundantly able to make good to him? A. Well, I hope so."

To sum it up, the defense is that while Blakslee, the assistant vice-president of Standard Oil stock to his brother-in-law, the vice-president of the bank, as security to him for the purchase by Blakslee's

First Department, March, 1912.[Vol. 149.]

account, it was not really security, but in case of Blakslee's death it would be in Ritts' possession with some sort of an undescribed lien attached to it, although without any of the indicia of ownership or power to transfer or deal with it; that the assignment and power, although duly executed by him, had been delivered to Ritts three years before for an entirely different purpose and had been kept by Ritts during all that time in his private safe; that when Ritts was suddenly called upon by his brokers he took that certificate of stock, pinned the transfer to it and forwarded it to the brokers with the agreement with them that it should be used as collateral for a loan to be obtained by them, and that while both Blakslee and Ritts agree that Ritts is a man of the highest integrity and honor, yet, as matter of fact, he was guilty of the conversion of Blakslee's stock and hence that no title was conveyed to Talcott and he must lose the amount of money loaned by him upon the strength of these documents.

If the assignment and power had been indorsed upon the back of the certificate, although in blank except as to signature and witness, I apprehend there would be no doubt, although a certificate of stock is not a negotiable instrument, that it would have presented such indicia of title that an innocent holder would have obtained good title. (*McNeil v. Tenth National Bank*, 46 N. Y. 325.) And if the assignment and power, though upon a separate paper, had identified by description the property intended to be assigned, the same rule would have applied. (*Smith v. Savin*, 141 N. Y. 315.) But, it is claimed, that although duly executed, the signature properly guaranteed, pinned to the certificate of stock and delivered and received in the regular course of business, the assignment and power being upon a separate paper and blank as to the property intended to be assigned, conferred no title upon Talcott, but on the contrary put him upon his inquiry and destroyed his claim of being an innocent holder for value.

I cannot accept at its face value the testimony of Blakslee and Ritts, deeply interested in the event as they are, Blakslee, an inferior officer of the bank, and Ritts the vice-president and chief executive thereof, and a man of substance and power, the attempt being to relieve Ritts of a clear obligation to Blakslee,

App. Div.]

First Department, March, 1912.

even at the expense of blackening himself. From such men, accustomed for years to banking and stock transactions, such a story is not credible. But even assuming it to be true, I think the plaintiff entitled to the remedy prayed. There was nothing which could reasonably be held to put him on his guard. The transaction occurred in the regular course of business, the amount advanced by him and the terms of the loan were reasonable and precisely the same terms that had been given by the trust company. Certainly the conduct of the defendant and of his brother-in-law made possible the transaction. So far as Nichols & Co. were concerned, the documents having been received either by mail or personally from Ritts and the discussion and interviews in regard thereto having been had with him, they were absolutely entitled to rely upon the *bona fides* of the transaction. If they were, it seems to me that everybody dealing with them upon the same papers in carrying out the precise transaction for which they were procured by Nichols & Co. must be entitled to the benefit of that knowledge which, in addition to the apparent regularity of the transaction, conferred authority to act under the power.

In the cases which have dealt with the fundamental question here involved, the reasons given for the decision of the court seem to me applicable to the situation here presented. Thus in *McNeil v. Tenth National Bank* (46 N. Y. 325) Judge RAPALLO said: "Where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance."

So in this case, Blakslee did deliver the certificate of stock to Ritts for security when about to engage in a joint stock purchasing enterprise; Blakslee did execute and deliver to Ritts a blank assignment and power of attorney and with the intent

First Department, March, 1912.

that it should be an effective power and should be used by Ritts under certain circumstances. When, therefore, Ritts in performance of the purchase agreed upon between him and Blakslee, presented to Nichols & Co. this certificate and this power with the request that they should use it as security to obtain a loan to carry the stocks which they had bought for his account, and Talcott thereon advanced his money, Talcott's rights are derived from the act of the real owner, Blakslee, "which precludes him from disputing, as against" Talcott, "the existence or mistake rested in" confidence he caused or allowed to appear to be Ritts. Blakslee, and Blakslee alone, created the apparent ownership of the stock.

As further said in the *McNeil* case: "The true inquiry in this case is, whether the plaintiff did convey to his brokers such an apparent title to, or power of disposition, over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* title to stock by delivery of the certificate with blank endorsement and power has been repeatedly shown and sanctioned by cases which have come before our courts. * * * Holder of such a certificate and power possesses all the indicia of title to the stock, and an apparently unlimited power of disposition over it. * * * Such, then, being the true and effect of the documents with which the plaintiff is in possession of his brokers, what position does he occupy toward persons in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the stock? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, can he not be truly answered that, by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and thereby empower the bearer of it irrevocably to dispose of the stock, he in fact substituted his trust in the honesty of his brokers, for the control which the law gave him over his own property?"

App. Div.]

First Department, March, 1912.

and that the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?"

In *Moore v. Metropolitan Nat. Bank* (55 N. Y. 46) GROVER, J., said: "One reason why an owner of corporate shares or of goods and chattels, who has conferred upon another the apparent ownership, without transferring to him a valid title, was held precluded from asserting his title, against a *bona fide* purchaser from such apparent owner, is that such purchase was made upon the faith of the title which he had apparently given, and that it would be contrary to justice and good conscience to permit him to assert his real title against an innocent purchaser from one clothed by him with all the indicia of ownership and power of disposition. * * * Another reason is that it presents a proper case for the application of the legal maxim that where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed."

It seems to me that nothing could be more contrary to justice and good conscience than to permit these brothers-in-law, fellow bank officers and participators in a stock purchase, to throw upon the banker the loss of the money loaned and required in that stock transaction, by a denial of agency, and the assertion of fraud and conversion as between themselves.

I think the claim that both the certificate and the power were delivered to Ritts for a limited purpose is met by the language of the court in *Knox v. Eden Musee Co.* (148 N. Y. 441), where ANDREWS, Ch. J., said of the *McNeil Case* (*supra*): "That case holds that an agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a *bona fide* transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal."

TALCOTT v. STANDARD OIL Co.

First Department, March, 1912.

be considered a border-line case, and yet conviction that the reasoning of the ad
and that the owner of the stock shou
remedy to the unfaithful agent whom he
that he is amply able to respond and up
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nocently parted with his money under
upon apparent evidence of title presen
ts and made possible, accepting the def
own negligence and misplaced confidence.
ent appealed from should be reversed an
with costs and disbursements to the appe
nt.

P. J., and McLAUGHLIN, J., concurred; L
ER, JJ., dissented.

(dissenting):

Affirmance on the opinion of Mr. Justice O'G
rm.

(dissenting):

Delivery of the certificate of stock by Blak
confer even apparent authority upon the la
to a third party. The undisputed testim
Ritts supports the finding of the trial court
the power of attorney in blank, signed by Bl
ten to Ritts years before the delivery of the
on for the specific purpose of enabling Ritt
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the name of Blakslee, that no occasion to r
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been entitled to rely upon it. Upon the bac
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d been given for a different purpose. Th

App. Div.] First Department, March, 1912.

papers, though pinned together, were entirely different instruments. The power of attorney did not purport in any way to relate to the twenty-five shares, and I do not think that the mere fact that it was pinned to the certificate justified the plaintiff in blindly relying upon it. While it is of little consequence except as bearing upon the conduct of Ritts, it appears that in order to obtain the certificate he offered to pay the sum that the plaintiff originally loaned on it. I think the plaintiff's representative made a mistake in not accepting that offer, and vote to affirm the judgment.

Judgment reversed, new trial ordered, costs to appellant to abide event.

MARSHALL E. WARD, Respondent, v. PAUL J. RAINY PIER COMPANY, Appellant.

First Department, March 22, 1912.

Principal and agent — action for commissions upon sale of bonds — evidence.

In an action by an agent to recover commissions alleged to have been earned in effecting the sale of bonds, the defendant claimed that plaintiff deceived the purchaser and misrepresented the facts for which defendant had to make settlement. Evidence examined, and held, that plaintiff failed to establish a cause of action.

APPEAL by the defendant, Paul J. Rainey Pier Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of April, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying the defendant's motion for a new trial made upon the minutes.

Samuel S. Whitehouse, for the appellant.

Harford T. Marshall, for the respondent.

CLARKE, J.:

The complaint alleged that on or about the 15th day of September, 1909, plaintiff and defendant entered into an agreement whereby defendant agreed to employ the plaintiff as

agent to sell its first mortgage, six per cent gold bonds and pay plaintiff a commission of ten per cent of the purchase price of all bonds sold by him as payment for his services in negotiating said sales.

The answer admitted the employment, but alleges that it "agreed to pay him for his services ten per cent of the moneys which the defendant should receive on account of the purchase price of all such bonds actually sold by him." And further alleges that the alleged sale of \$30,000 of such bonds to Mary Reilly was not an actual *bona fide* and binding sale of such bonds to her; that said alleged sale of such bonds to her was never completed in whole or in part and was not and is not enforceable against her.

Plaintiff, who had formerly been in the employ of the Title Guarantee and Trust Company, but had left its employ a year prior to the transactions here under consideration, testified: "I was to receive ten per cent as my commission for the sale and my commission was to be paid to me at the time of the money being turned over to the Paul J. Rainey Pier Company or to him," referring to Mr. De Saulles, the vice-president and subsequent president of the company. Plaintiff claims to have sold \$40,000 worth of these bonds and admits that he received \$2,000 by way of commission and sues for the namely, \$2,000.

The transaction under consideration was the alleged sale of \$30,000 of bonds to Miss Mary Reilly. Miss Reilly sent in checks to the order of the Title Guarantee and Trust Company. She subsequently brought suit for the recovery amount and the defendant company in settlement of her claim against it paid her \$2,000 in cash and \$685 by way of interest and gave her a note for \$28,000 with a large amount of collateral.

The defense to the suit at bar was that plaintiff defrauded Miss Reilly and misrepresented the facts to her; that she thought she was buying a bond guaranteed by the Title Guarantee and Trust Company, said company was the trustee of the mortgage securing said bonds and that when she discovered the facts she brought the suit which resulted in the settlement above set forth.

App. Div.] First Department, March, 1912.

Miss Reilly testified that she was dealing with the plaintiff as the representative of the Title Guarantee and Trust Company; that she had had guaranteed mortgages of that company before; that she was a dressmaker; that she had saved this amount of money and desired to invest it in the same kind of guaranteed mortgages; that she asked for five per cent mortgages and that the plaintiff told her that the company did not have any that paid that amount, but that he had these bonds of the Paul J. Rainey Pier Company which were six per cent bonds and which were just as safe as the mortgages she desired; that they were guaranteed by the Title Guarantee and Trust Company and that if anything was safe that company was; that he told her that his mother had invested \$25,000 in them; that all of these bonds had been sold and that the First or Second National Bank of Brooklyn had subscribed for \$125,000 of them. As matter of fact none of the bonds had been sold or subscribed for. This was the first transaction in them and they were not delivered until some time after the money had been paid because they were not ready for delivery. Neither Ward's mother nor the Brooklyn bank referred to had invested in any of these bonds.

It further appeared that under the subscription agreement a stock bonus to the extent of fifty per cent of the bonds subscribed for was to be delivered with them. Miss Reilly was told nothing of this stock bonus but De Saulles and the plaintiff agreed to divide the stock which was to be delivered as a bonus upon these bonds between themselves.

Upon the facts proved no cause of action was established against the defendant and the verdict was against the evidence.

It follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs and disbursements to the appellant to abide the event.

INGRAHAM, P. J., LAUGHLIN, SCOTT and MILLER, JJ., concurred.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

LOUIS ABEL, Respondent, *v.* THE NATIONAL RESERVE BANK OF THE CITY OF NEW YORK, Appellant.

First Department, March 22, 1912.

Contract — action on quantum meruit for services in assisting in organization of bank — evidence.

The plaintiff, in an action on a *quantum meruit* to recover for services, alleged that he was employed by the defendant and its agents to assist in the organization of the defendant's bank and the reorganization of its predecessor and that he was promised an official position with the reorganized bank. The defendant denied that it ever employed the plaintiff. Evidence examined, and *held*, insufficient to support a verdict for the plaintiff.

A letter written to the bank by the plaintiff long after the transactions in question, not being in response to any communication from the bank, was a self-serving document and inadmissible in evidence.

APPEAL by the defendant, The National Reserve Bank of the City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of April, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 21st day of April, 1911, denying the defendant's motion for a new trial made upon the minutes in an action brought to recover on a *quantum meruit*.

Emery H. Sykes of counsel [*J. Hampden Dougherty, Jr.*, with him on the brief], *Sullivan & Cromwell*, attorneys, for the appellant.

Michael Martin Dolphin, for the respondent.

CLARKE, J.:

The complaint alleges that on or about the 1st day of October, 1908, the plaintiff was employed by the defendant to perform certain duties in and about the organization of the defendant bank and the reorganization of the defendant's predecessor, the Consolidated National Bank of New York, in the way of soliciting subscriptions for the capital stock of the defendant bank and procuring deposits for the defendant

App. Div.]

First Department, March, 1912.

bank, and at the special request of the defendant and its agents plaintiff undertook to perform and did perform the said duties under the direction of the defendant and of its agents, and continued under the defendant's employment as aforesaid from the 1st day of October, 1908, to the 1st day of October, 1909, and that the reasonable value of such services was \$3,525, for which he demanded judgment.

The plaintiff testified that in the fore part of October, 1908, he was employed as paying teller by the Greenwich Bank; that Mr. George W. Adams "told me that he was elected a member of the reorganization committee of the Consolidated National Bank, about to form a new bank, and the name was not decided upon. It was to take over the assets of the Oriental Bank, and that as a member of that committee, of course, he said they needed help to secure subscriptions, that they wanted additional capital stock, and if I would come on and secure this stock I would be remunerated for same, that I would get a position as good if not better than the one I had in the Greenwich Bank. * * * I saw Mr. Adams in about three days and talked it over again and he repeated his promises, and said that there was a chance of my getting an official position. Naturally I assented to going out and working for that position, an official position with the reorganized bank."

The defendant denied that it had ever employed the plaintiff or promised to remunerate him, and took the position that whatever he did he did for Mr. Adams, who subsequently became the cashier of the bank. The learned court charged the jury as follows: "Then you will have in mind Adams's testimony, to the effect that nothing was said about any remuneration, except to promise to give him a position in the new bank, or the bank under the new name. If you find from the testimony that the promise to the plaintiff was merely that he was to have a position with the defendant bank as the sole reward for his services, your verdict will be for the defendant; because there is nothing in the testimony that I can recall that would sustain the theory that the bank was ever advised of any such specific promise to give him a position in the new bank; and before the bank can be held to have ratified the agreement

First Department, March, 1912.

plaintiff made with Adams it must be shown that the plaintiff knew what the arrangement was. The bank cannot be held to have ratified some agreement with Adams as to the amount of the payment to be made for services, unless it is shown that the new bank knew what the nature of the promise made by Adams was. If there was nothing more than the promise of a position, your verdict will be for the defendant; and let me tell you that the burden is upon the plaintiff to show that there was a promise of remuneration for services in addition to the promise of as good or a better position in the bank." Therefore, as the case was submitted to the jury, it was the duty of the court to find by a preponderance of the evidence that there was a promise to remunerate outside of and independent of the promise of a position by Adams, and that this promise was ratified by the bank. This being the law the verdict cannot stand. It is not only against the weight of the evidence, but there is hardly a scintilla of competent evidence to support thereof.

There must be a new trial, we call attention to the evidence of the letter of January 11, 1910, written by the plaintiff long after the transactions in question. This letter was not in response to any communication from the bank nor was it answered by it, and is therefore a non-existing document and so incompetent and inadmissible. Judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to

RAHAM, P. J., LAUGHLIN, SCOTT and MILLER,
ordered.

Judgment and order reversed, new trial ordered, -
appellant to abide event.

**EDMUND BATCHIS, Respondent, v. GEORGE LEASK and Others,
as Trustees under the Last Will and Testament of HUDSON
HOAGLAND, Deceased, Appellants.**

First Department, March 22, 1912.

Trust — enforcement of trust — action by assignee of beneficiary — complaint — demurrer.

A suit to enforce a trust can only be brought by a beneficiary, and it must be in equity, unless there has been an accounting and promise to pay, or the equivalent thereof, when an action at law may be brought for the ascertained sum. In the latter case the action may be brought by an assignee of the claim.

A complaint, in an action by an assignee of a beneficiary against his executors and trustees to enforce payment of the income from a trust fund, which alleges that on a certain date the defendants "made a further division of the income" in their hands and distributed the same to the various *cestuis que trust* entitled thereto, except that they unlawfully withheld from Hoagland the sum of \$208, is demurrable, because it fails to state that there had been an accounting and promise to pay, or the equivalent thereof, or that the trustees had ascertained and established that on that date the sum of \$208 was due to Hoagland.

APPEAL by the defendants, George Leask and others, as trustees, etc., from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of December, 1911, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendants' demurrer to the complaint.

J. Hampden Dougherty, for the appellants.

Arthur G. Stiles of counsel [*Henry W. Baird*, attorney], for the respondent.

CLARKE, J.:

The plaintiff is the assignee of a beneficiary under the will of Hudson Hoagland, and the defendants are the executors and trustees.

The complaint alleges that the 17th clause of the will gave and bequeathed to the executors \$75,000 in trust, to pay over the income of \$25,000 thereof to Charles F. Hoagland during

First Department, March, 1912.

fe, and, upon his death, leaving a child or children surviving him, to pay over the principal of said sum to said child or children; that, according to the terms of said will, other moneys were to be paid over to the defendants to be in trust for other beneficiaries; that such trustees still securities to the amount of \$500,000 in trust under said F. Hoagland and other *cestuis que trust* that Charles F. Hoagland is still alive; that on and to the 7th day of April, 1908, the defendants trustees received the income of said trust became due and payable and distributed entitled thereto; "That on the 7th day of O defendants herein, as such trustees, made a of the income then in their hands of said distributed the same to the various *cestuis que* thereto, except that said defendants unlawfully said Charles F. Hoagland the sum of \$208, b portion of the income of said trust funds that been distributed to the said Charles F. Hoagla defendants still unlawfully refuse to pay over to F. Hoagland, or his assigns, said sum of \$208, payment thereof has been duly demanded." The s similar allegations as to five other semi-annual d eads: "That on or about the 4th day of May, all of said sums of money hereinbefore stated ha and owing, and after the cause of action hereir, and prior to the commencement of this acti F. Hoagland, for good and valuable considerati turned to the plaintiff herein all claims that he had defendants herein by reason of the claims and herein set forth, and that the plaintiff is still the r and holder of said claims and of said cause of act before he asked judgment for \$1,248.

The defendants demurred, *first*, that there is a defect of plaintiff in the omission of Charles F. Hoagland, has the right to enforce the performance of the ed in the complaint; *second*, that there is defect of defendant in the omission of Charles F. Hoagland, the p to the money demanded by the plaintiff, which i

App. Div.]First Department, March, 1912.

income of a trust of personal property, and which by the terms of the trust defendants are directed to apply to the use of said Hoagland; *third*, that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer on all three grounds without opinion.

An action to enforce a trust can only be brought by a beneficiary, and it must be in equity. But if there has been an accounting and promise to pay, or the equivalent thereof, an action at law may be brought for the ascertained sum; and if an action at law could be so brought the claim could be assigned and the action brought by the assignee.

The question is whether the complaint sufficiently states the ascertainment of a sum due and promise to pay, or the equivalent thereof. The language of the 8th clause of the complaint, which is typical of all the items constituting the cause of action, says that on a certain date the defendants made a further division of the income in their hands and distributed the same to the various *cestuis que trust* entitled thereto, except that they unlawfully withheld from Hoagland the sum of \$208, being part of that portion of the income that should then have been distributed to him and unlawfully refuse to pay over to him or his assigns said sum though demanded.

Even exercising the utmost liberality, that clause cannot be interpreted as the equivalent of the statement that there had been an accounting or that the trustees had ascertained and established that on that date the sum of \$208 was due to Hoagland.

The interlocutory judgment appealed from should be reversed and the demurrer sustained, with costs and disbursements to the appellants, with leave to respondent on payment thereof to serve an amended complaint.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and MILLER, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to plaintiff to amend on payment of costs.

First Department, March, 1912.

PEOPLE OF THE STATE OF NEW YORK ex rel. LUKE SMITH,
Appellant, v. JAMES CREELMAN and Others, Constituting
Municipal Civil Service Commission of The City of New
York, Appellants.

First Department, March 22, 1912.

First Department, March 22, 1912.

284 of the Greater New York charter, as amended by
er 612, and Laws of 1907, chapter 278, providing that
be appointed patrolman who shall be at the date of
on the civil service eligible list over thirty years of
the applicant shall not be over thirty years of age at
nal completion of the whole process of examination
ion of the result.

An applicant for patrolman, who after passing all his examinations thirty years of age seven days before his name is put on the eligible list, is disqualified.

AL by the defendants, James Creelman and others, against the municipal civil service commission of New York, from an order of the Supreme Court, New York Special Term and entered in the office of the county of New York on the 6th day of February, granting the relator's motion for a peremptory writ commanding the defendants to forthwith place the relator's name on the eligible list for the position of captain in the police department.

et S. Benedict of counsel [Terence Farley with brief], Archibald R. Watson, Corporation Counsel, appellants.

ed J. Talley, for the respondent.

E, J.:

tor became thirty years of age on the 25th of September, 1910. In September, 1910, he filed an application for appointment as patrolman in the police department. He then received notice to appear before the examiners of the municipal service commission, and on March 1, 1911, appeared and submitted to a physical examination. Two thousand two hundred

App. Div.] First Department, March, 1912.

dred and ninety applicants appeared for the medical test, of whom 1,460 were passed. Of the 1,460 who took the physical tests 1,322 passed. The examinations were held on twenty-five different days before all of the candidates could be examined and were concluded on May 10, 1911. On July 14, 1911, notices were sent out to all those who had successfully passed the medical and physical tests to appear for the mental examination upon August 1, 1911. One thousand one hundred and eighty-five applicants appeared for said examination. The final examination of the papers of these candidates and the computation of their marks was finished October 2, 1911, and the chief examiner notified the commission that the marks had been made up and placed upon the schedule sheet. From this sheet the eligible list also was made up, omitting the names of all those who failed to pass the examination or were in any way disqualified. Among those who were disqualified by reason of the fact that he had become thirty years of age before the completion of the schedule sheet was the relator. For that reason his name was not placed upon the eligible list which was established on October 2, 1911.

Section 284 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1903, chap. 612, and Laws of 1907, chap. 278) provides: "No person shall be appointed patrolman who shall be at the date of placing his name on the civil service eligible list over thirty years of age." The relator claims and it is not denied that he passed said examinations successfully, receiving more than the required minimum percentage, which was seventy per cent. He also claims that the establishment of said eligible list was completed and all papers therein rated on or about the 10th day of August, 1911, on which day deponent was under the age of thirty years, not having arrived at said age until the 25th day of September, 1911. He applied for a peremptory writ of mandamus commanding the civil service commission to place his name on the eligible list and to certify his name in its proper order to the police commissioner for appointment. The learned Special Term having granted the application this appeal is taken.

Prior to 1903, section 284 of the charter provided that "No person shall be appointed patrolman who shall be at the date of

First Department, March, 1912.

over thirty years of age." (*Original Charter*, 7, chap. 378; *Revised Charter, Laws of 1901*, It could well happen that a candidate who had met all the requirements of the various examinations and been duly placed upon the eligible list for could thereafter lose his right to the appointment by efflux of time, no vacancy occurring and no having been made before he had arrived at the years. In 1903 the Legislature altered the law so that the age should apply to the placing of his name upon the eligible list and not to the time of going upon the eligible list and these provisions were re-enacted in 1907 so that where an age limitation is provided the event determining the limitation can not work apparent hardship in an individual case evidently thought that it was fairer to have the time of going upon the eligible list rather than the time of appointment. But some definite a time had to be fixed. So it was established the placing his name on the civil service does not mean the taking of the examination of the candidates' papers by the examining thereof by said examiners, but it means the final completion of the whole process of examination and computation as the result of which not only competence but the relative standing of all ascertained and fixed and a definite list th

whole period of the medical, physical and mental examination and the review of the papers and the computation of marks here under consideration, and up to the 2d of October, 1911, when this list was established, there was an eligible list for the position of patrolman which was established June 18, 1910, and from which appointments were being made continuously. From August 1, 1911, seventy-five patrolmen were appointed from this list. It is evident that the name of the relator had been placed upon the eligible list up to the 2d of October, 1911. Therefore said date he arrived at the age of thi

App. Div.] Second Department, March, 1912.

years and had, therefore, become disqualified was his misfortune. But a hardship to an individual does not authorize the court to disregard the plain provisions of law.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the application denied, with ten dollars costs to the appellants.

INGRAHAM, P. J., LAUGHLIN, SCOTT and MILLER, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

JAMES HARLEY, Respondent, *v.* **HUMPHREY L. PLANT and WILLIAM GLEICHMANN**, Appellants.

Second Department, March 15, 1912.

Mechanic's lien — municipal improvement — judgment against principal contractor — sureties not made defendants not bound by judgment.

Although a sub-contractor, having filed a lien for moneys due the principal contractor on a municipal improvement, obtained a decree establishing a lien upon the fund, the judgment is not binding upon the sureties of the principal contractor on a bond filed by him pursuant to the statute to discharge the lien if the sureties were not parties to that suit.

Where the suit was dismissed as against the city, a codefendant, the result of the judgment was merely to determine that the principal contractor owed the sum in controversy to the plaintiff, the sub-contractor. It is in the nature of a personal judgment against him, and is not *res adjudicata* against the sureties, not made parties, where they never undertook to pay a judgment which the plaintiff might secure against the principal contractor, but merely such judgment as might be recovered in a suit to enforce the lien.

APPEAL by the defendants, Humphrey L. Plant and another, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 5th day of October, 1911, granting the plaintiff's motion for judgment on the pleadings and denying a similar motion made by defendants, and also from a judgment in favor of the plaintiff entered in said clerk's office on the 9th day of October, 1911, upon the said order.

Second Department, March, 1912.

[Vol. 149.]

James Troy and Thomas H. Troy, for the appellant Humphrey L. Plant.

Frank S. Angell [*Charles F. White* with him on the brief], for the appellant William Gleichmann.

George W. Titcomb, for the respondent.

WOODWARD, J.:

The complaint in this action alleges the filing of a notice of lien with the proper officials for the sum of \$4,177.30 on the moneys due or to grow due one Peter Guthy under his contract with the city of New York for the construction of a public improvement; that thereafter proceedings "were taken by said Guthy for the purpose of securing the cancellation and discharge of said lien by filing a bond in the manner prescribed by the Lien Law, by presenting to the Supreme Court a petition, a copy of which is hereto annexed and made a part of this complaint, * * * and thereafter an order of the Supreme Court * * * was made September 27, 1909, * * * fixing the amount of the undertaking to be given by said Guthy to discharge said lien to be the sum of \$8,354, said undertaking to be executed pursuant to chapter 38 of the Laws of 1909. That thereafter on or about the 16th day of October, 1909, the plaintiff began an action in the Supreme Court, Kings county, to foreclose said lien; * * * that thereafter the defendants executed a bond conditioned that they should well and truly pay any judgment which might be recovered in an action to enforce the lien before mentioned;" that this bond was approved by a justice of the Supreme Court and an order entered canceling and discharging the lien, and "thereafter said bond and a copy of said order were filed with the Comptroller of the City of New York and with the Board of Education of the City of New York and plaintiff's said lien was thereupon canceled and discharged, as provided in said order. * * * That thereafter such proceedings were had in said action brought to foreclose said lien that on or about the 3rd day of June, 1911, final judgment therein was obtained by the plaintiff and was entered by the Clerk of the County of Kings, as follows: 'Ordered, Adjudged and Decreed that the lien filed by

App. Div.] Second Department, March, 1912.

the plaintiff on the 27th day of August, 1909, with the Comptroller of the City of New York and the Board of Education of the City of New York and set forth in the complaint was then and continued to be until its said bonding and cancellation and would now be, except for such bonding and cancellation, a good and valid lien to the extent of \$4,177.30, with interest, now amounting to \$380.07, on the moneys of the City of New York due or to become due the defendant Guthy on account of the construction of the public improvement mentioned in said lien, and that the amount due plaintiff on said lien is the amount thereof, \$4,177.30 with interest from the time when due, amounting to \$380.07, and that the plaintiff became and was entitled to enforce said lien against the moneys in the hands of the City of New York applicable to said public improvement until its said bonding and discharge, and would now be so entitled, except for such bonding and discharge; and it is further Ordered, Adjudged and Decreed that the defendant, The City of New York, is, and has been since the aforesaid bonding and discharge of said lien an unnecessary party to this action, and this action is discontinued against it, and that the plaintiff have personal judgment against the defendant, Peter Guthy, for the sums due, as aforesaid, making a total of \$4,557.37, together with the sum of \$96.47, costs to be taxed, and that the plaintiff have execution therefor.'"

The complaint then closes with the allegation that "execution upon said judgment was duly issued against said Guthy to the sheriff of the County of Kings, where said Guthy then resided, and said execution has been returned wholly unsatisfied and said judgment remains wholly unpaid," and a demand for judgment against the defendants, the sureties upon the bond mentioned in the complaint, for the sum of \$4,653.84, with interest and costs.

The obligation of the bond on which the defendants are sureties is that "if the above bounden Peter Guthy, William Gleichmann and Humphrey L. Plant shall well and truly pay any judgment which may be recovered in an action to enforce the lien before mentioned, then this obligation to be void," etc.

The defendant Plant, answering the complaint, "Denies that the action referred to in paragraph 3 thereof, was begun or

Second Department, March, 1912.

[Vol. 149.]

commenced against the defendants in this action, or either of them, or against the City of New York," and avers as a defense to this action "that said action was brought and prosecuted to judgment against the said Peter Guthy alone, and not otherwise, and this Court did not acquire any jurisdiction in said action of the defendants herein, or either of them, or of the said City of New York, for the foreclosure of said alleged lien, or otherwise, and said alleged judgment in said action did not foreclose or constitute a foreclosure or enforcement of said alleged lien as against the defendants herein or the said City of New York, and is not binding on them, or either of them, and is in legal effect a judgment for the sum of money therein mentioned against the said Peter Guthy only, and not otherwise." There are some other allegations of new matter pleaded as a defense not necessary to be here considered.

The defendant Gleichmann makes a general denial in substance of the matters alleged in the complaint, except that he admits being one of the sureties upon the bond, and for a first defense alleges that on the 22d day of March, 1910, the plaintiff commenced an action against him upon the bond hereinbefore mentioned, the complaint in that action being set forth as an exhibit, and showing that the action was brought against Peter Guthy, the board of education of the city of New York, the city of New York, Humphrey L. Plant and William Gleichmann. Among the allegations of that complaint was one that "no other action has been had at law, or otherwise, for the recovery of said money, or any part thereof." The defense further alleges that the defendant Gleichmann appeared in that action and served an amended answer, and that upon the action coming on for trial on the 8th day of March, 1911, plaintiff, through his counsel, moved to discontinue the same, and that subsequently the plaintiff was permitted to withdraw that action, notwithstanding the objection of the defendants in the present action, and it is urged that the matters contained in the action of March, 1910, became *res adjudicata*. It is further alleged that "no notice has been given by the plaintiff herein to this defendant that an action was pending against the said Guthy upon which he would be held responsible, and that the said sureties have been deprived of their

App. Div.] Second Department, March, 1912.

rights by the negligence of the plaintiff to notify them that an action was pending so that the sureties could come in and defend said action."

It appears, for the purposes of this appeal, that an action in due form was commenced against the proper parties for the foreclosure of the lien, or for the determination of the questions on which the liability of the sureties upon the original bond depend, and that this action was discontinued without giving the defendants in the present action any opportunity to litigate these questions. After the second action had been thus discontinued, it appears that the original action, commenced on the 16th day of October, 1909, and which resulted in the giving of the bond involved in this action, was in some manner revived, and "thereafter such proceedings were had in said action brought to foreclose said lien that on or about the 3rd day of June, 1911, final judgment therein was obtained by the plaintiff," etc., and this final judgment was a personal judgment against Peter Guthy, the principal in said bond. Of course, in the action of October 16, 1909, which resulted in the giving of the bond, neither of the defendants in this action were parties, and while the city of New York appears to have been made a defendant originally, it was provided in the judgment that the action should be dismissed as against it, so that the result of the litigation was to determine that Peter Guthy owed the plaintiff the sum of money claimed to be due to the plaintiff as a sub-contractor under Guthy in the construction of a public improvement for the city of New York. The contention of the plaintiff here is, and in this he has been sustained by the order granting judgment upon the pleadings, that the defendants, as sureties, are bound by this judgment in the action of October sixteenth, to which they were not parties, because of the recitals in that judgment to the effect that the original filing of the notice of lien operated to give to the plaintiff a good and valid lien upon the fund in the hands of the city of New York. There can be no question, of course, that as between the parties to that action the judgment is conclusive, but does it operate to conclude the defendants, who were not parties? That is the broad question presented by this appeal.

Second Department, March, 1912.

When the original action of October, 1909, was instituted, resulting in the giving of the bond and the discharge of the same, new parties in interest were created. There had, at that time, been no adjudication that there was a good and valid lien; the bond was given for the very purpose of guaranteeing the sub-contractor his pay and leaving the question of the amount and all other questions open for future adjudication. The condition of the bond was that if the principal and his sureties, the defendants in this action, "shall well and truly pay any judgment which may be recovered in an action to enforce the lien before mentioned," and this clearly created an action which should leave open for litigation by the parties in interest all of the questions which might arise in respect "to enforce the lien before mentioned." Of course, when the bond was given the lien was canceled of record, but it did not determine the amount due or to become due to the plaintiff, and while this question could be determined, perhaps, in the original action, as between the plaintiff and Peter Guttmann or by one else who was a party to such action, we are of the opinion that it could not be determined as against persons who had an interest in the question and who were not made parties to the action. The action was dismissed as against the city of New York, and the only result of the judgment in the original action, notwithstanding its form, was to determine that the defendant Guttman personally owed a given sum of money to the plaintiff. It was, in effect simply an action at law for a sum of money, and the defendants in the present action never undertook to pay the judgment which the plaintiff might secure against Guttman, but "any judgment which may be recovered in an action to enforce the lien before mentioned." The lien is not attachable; it attaches to "the moneys of the State or of a [municipal] corporation applicable to the construction of a public improvement, to the extent of the amount due or to become due under such contract, upon filing a notice," etc. (Lien Law [Consolidated Laws, chap. 33; Laws of 1909, chap. 38], § 5.)* The action is not one against individuals; it is against the fund. The plaintiff is bound to show, in an action to which all interested par-

* See Laws of 1911, chaps. 450, 873.—[REP.]

App. Div.] Second Department, March, 1912.

have been summoned, that he has a lien upon the fund; that he would be entitled, except for the intervention of the bond, to have a certain amount of the fund "applicable to the construction of such improvement," and this must depend upon the amount of work he has performed under the terms of his contract, the number and amount of liens which may have been filed ahead of his claim, the amount which may have been lawfully disbursed before his lien was filed, and all of the other matters which might be involved in such a litigation. Until there has been such an adjudication the bondsmen are not liable, for they have never undertaken to pay any personal judgments against their principal, only such judgment as shall be recovered in an action to enforce the lien. Subdivision 4 of section 19 of the Lien Law (Consol. Laws, chap. 33; Laws of 1909, chap. 38), in providing for bonds for the discharge of liens other than liens for labor performed or materials furnished for a public improvement, says that such bonds shall be "conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien." Such a bond takes the place of the property and becomes the subject of the lien, the same as moneys paid into court or securities deposited after suit brought to foreclose the lien. (*Morton v. Tucker*, 145 N. Y. 244.) In the case cited the court, in discussing the provisions for the discharge of a lien either after or before action brought, in which a bond with two or more sureties may be given by the owner in such sum as the court may direct, but not less than the amount claimed in the notice of lien, conditioned for the payment of any judgment which may be rendered against the property, points out some of the conflicting authorities, and says: "The sureties in the bond intended, and must be understood as undertaking, to pay the amount which it should be adjudged was due and owing to the plaintiffs, and which was chargeable against the property by virtue of their notice of lien. In other words, the condition was for the payment of any judgment which might have been rendered against the property had not the bond been given. The bond, as we have seen, is given to discharge the lien. It is one of the proceedings provided for by the statute, and it was evidently intended that the bond should take the place of

Second Department, March, 1912.

[Vol. 149.]

the property and become the subject of the *lien in the same form and manner as is provided for in the case of the payment of money into court, or the deposit of securities under an order of the court after action brought.* (*Ward v. Kilpatrick*, 85 N. Y. 413-418.) If this is so, the practice is simple. The action is in equity brought under the statute in which all of the persons interested, including the sureties upon the bond, are made parties. The complaint is in the usual form, with the exception that it should allege the giving of the bond and the discharging of the lien, so far as the real estate is concerned, and, instead of asking judgment for a sale of the premises, it should demand relief as against the persons executing the bond for the amount that should be determined to be payable upon the *lien*. The court then upon the trial can determine the rights and equities of all of the parties and award the final judgment according to the statute." A similar practice for the discharge of a public improvement is prescribed by subdivision 21 of the Lien Law (Consol. Laws, chap. 3, 1909, chap. 38),* which provides that such bonds shall be conditioned for the payment of any judgment which may be recovered in an action to enforce the lien."

If this is the correct practice, and we do not find it mentioned except in the case of *Hawkins v. Mapes-Reduction Co.* (82 App. Div. 72), which has been pretty thoroughly discredited upon this point (*Hawkins v. Mapes-Reduction Co.*, 178 N. Y. 236, 241; *Milliken Bridge Incorporated, v. City of New York*, 201 id. 65, 74), it is apparent that the defendants now before the court have been deprived of their rights, for it nowhere appears that the parties to the original foreclosure action, or that the complaint in that action ever contained the necessary allegations to constitute a good cause of action against them. In *Johnson v. May* (120 App. Div. 448) an action was brought to foreclose a mechanic's lien, Johnson and Slocum, sureties upon a contract to procure a discharge of the lien, being made parties to the suit, court, after pointing out that "The undertaking executed by the defendants Johnson and Slocum, and referred to in

* See Laws of 1911, chaps. 450, 878.—[REP.]

App. Div.] Second Department, March, 1912.

complaint, is conditioned for the payment of any judgment which may be rendered against the property in an action to foreclose the lien," say: "We agree with the defendants that they are not liable in this action unless the plaintiff had a valid lien, and this question is open to litigation in this action." (Citing *Parsons v. Moses*, 40 App. Div. 58.)

It is true that in *Ringle v. Matthiessen* (10 App. Div. 274; affd., without opinion, 158 N. Y. 740) it was held that an action at law could be maintained where a bond had been given under the statute to discharge a mechanic's lien, and where, after the lien was discharged, the action was prosecuted to judgment against the original parties, the sureties upon the bond not having been brought in as parties, but in that case the defendant was the owner of the property, and the judgment adjudged that the plaintiffs recover against the defendants the amount of their claim, and that they had a lien against the premises described therein for the amount of their claim. There was an adjudication of a lien against the premises of the owner, who was a party to the action, and who had an interest to interpose any defense which might exist, and who would naturally keep his sureties advised of the situation, which is quite a different situation from that presented in the case at bar, where the action was to foreclose a lien against a fund in the custody of the city of New York, and where it was adjudged that the city was not a proper party to the action, and the complaint was dismissed as against the municipality, and a mere personal judgment was entered against the contractor. The owner of the fund was not before the court; there is nothing in the record to show that the defendant contractor had earned any part of the fund, or that he had any interest, at the time the original action was brought to trial, in asserting the rights of his sureties. The court in *Pierce, Butler & Pierce Manufacturing Co. v. Wilson* (118 App. Div. 662, 664), after calling attention to the rule of this case, and that laid down in *Morton v. Tucker* (*supra*), say: "The latter, however, would appear to be the better practice and this seems to have been the view of the Court of Appeals in *Morton v. Tucker* (*supra*)."
(See *Maneely v. City of New York*, 119 App. Div. 376, 390.)

Second Department, March, 1912.

In the original foreclosure action, the only parties before the court (for the case was dismissed as against the city of New York) was the plaintiff, a sub-contractor, and the defendant Guthy, a contractor, and the only judgment in that action, aside from the adjudication that the city of New York was not a party in interest, was a personal judgment of the plaintiff against the defendant. There were recitals in the judgment that there was a good and valid lien, or would have been except for the bonding, which as between the parties to that action were proper enough, but there was no judgment other than a personal judgment against the defendant in that action, and we are of the opinion that the doctrine of *Ringle v. Matthiessen* (*supra*) ought not to be extended to meet the facts of this case, particularly in view of the attitude of the Court of Appeals in *Milliken Brothers, Incorporated, v. City of New York* (201 N. Y. 65, 74). In the case cited the court say: "The appellants * * * contend that by reason of the deposit to discharge their liens they are entitled to have the fund, for which they recovered personal judgments paid the fund, even if their claims were invalid. We agree with the majority of the Appellate Division that this contention cannot be upheld. Subdivision 4 of section 21 of the Law provides for the discharge of a lien by the deposit of a sufficient sum of money. In such case the sum deposited is a substitute for the fund to which the lien attached until the deposit was made. A valid lien on the primary fund therefore, be established to justify payment out of the deposit. The argument of the appellants is that subdivision 5 provides for the discharge of a lien by the execution of a sufficient undertaking conditioned for the payment of any judgment which may be recovered in an action to enforce the lien; that section 3412 of the Code of Civil Procedure* authorizes a recovery by a lienor of a personal judgment for his claim when he fails to establish a valid lien; that had an undertaking been given to discharge the lien, the sureties would have been liable for the personal judgment, and that the liability should be the same whether the lien is discharged by a deposit or by the execution."

* See Lien Law (Consol. Laws, chap. 33; Laws of 1909, chap. 38), § 54.—[REDACTED]

App. Div.] Second Department, March, 1912.

cution of an undertaking. In *Hawkins v. Mapes-Reeve Const. Co.* (82 App. Div. 72) the contention of the appellants, so far as it relates to an action on an undertaking, was upheld by a divided court. The case was affirmed in this court (178 N. Y. 236) but on the ground that the claimants' liens were valid. The court declined to pass upon the question on which the case had been decided in the Appellate Division, nor is it necessary to determine that question now. It is sufficient to say that as the various provisions of the Lien Law relating to the discharge of liens are directed towards the substitution of the fund or undertaking in lieu of the thing against which the lien attached, the substituted liability should not be greater than the original liability, unless the direction of the statute is clear and express. No such direction relating to the deposit of moneys is to be found in the statute, whatever may be the case as to undertakings."

Clearly the Court of Appeals is not in accord with the doctrine of the *Hawkins Case* (*supra*), and we are clearly of the opinion that the defendants in the present action are entitled to be heard upon the issues raised by their answers, as against a plaintiff who has merely a personal judgment against the principal contractor, and particularly as such personal judgment may be procured where there is a failure to establish the lien. (Code Civ. Proc. § 3412; Lien Law [Consol. Laws, chap. 33; Laws of 1909, chap. 38], § 54.)

The judgment and order appealed from should be reversed, with costs to the appellants, and judgment directed for the defendants upon the pleadings, with costs.

JENKS, P. J., HIRSCHBERG and RICH, JJ., concurred; BURR, J., not voting.

Judgment and order reversed, with costs to the appellants, and judgment directed for the defendants upon the pleadings, with costs,

Second Department, March, 1912.

PEOPLE OF THE STATE OF NEW YORK *ex rel.* PATRICK LEONARD, Relator, *v.* JAMES C. CROPSEY, *as Police Commissioner of the Police Department of the City of New York,* respondent.

Second Department, March 15, 1912.

Principal corporation — certiorari to review dismissal of policeman in New York — evidence — uncorroborated testimony of girl of immoral character.

orari to review the action of the police commissioner of the city of New York in dismissing a patrolman on the charges that he left his post and entered certain premises for reasons other than those of police duty; that he violated a rule of the police by failing to report such action; that he failed to take action upon finding a young girl in the premises which he entered. Evidence upon the trial before the deputy police commissioner held, that the determination should be reversed and a new trial granted.

In order to sustain such charges there must be positive evidence of a material element of the offense.

Uncorroborated testimony of a girl of immoral character is not entitled to very little weight.

CERTIORARI issued out of the Supreme Court and the 6th day of December, 1910, directed to James C. Cropsey, police commissioner of the police department of the city of New York, commanding him to certify and return to the clerk of the county of Kings all and singular writings of his predecessor in relation to the dismissal or from his position as a member of the police department of the city of New York.

Jacob Rouss [Louis J. Grant with him on the brief] relator.

James D. Bell [Frank Julian Price and Archibald son with him on the brief], for the respondent.

SCHBERG, J.:

On the 6th day of July, 1910, three charges in writing were made by an inspector in the police department of the city of New York against the relator, a patrolman. These charges were

App. Div.] Second Department, March, 1912.

(1) that the relator at about two-thirty A. M. of January 23, 1910, left his post for reasons other than the performance of police duty and entered the premises No. 2084 First avenue, in the borough of Manhattan; (2) that he violated rule 45, paragraph 14 of the rules and regulations of the police department by failing to make report of such action at the thirty-ninth precinct station house; and (3) that he failed and neglected to take proper police action upon finding one Alvina Seiler, aged fifteen years, in said premises at said time. The relator was tried on those charges before the third deputy police commissioner, and on the 3d day of August, 1910, he found the relator guilty as charged and recommended his dismissal. That finding and recommendation were approved by Police Commissioner William F. Baker on the 16th day of August, 1910, and on the same day an order dismissing the relator from the police department was signed.

It appears that some time during the evening of January 22, 1910, or the early morning of the following day, one Edward F. Downes, a patrolman attached to the same precinct as the relator, brought the girl, Alvina Seiler (with whom he had previously indulged in sexual intercourse), to the building No. 2084 First avenue, a garage then used by the board of education of the city of New York and occupied by a night watchman named James Cuffe, and left her with him. Downes was tried jointly with the relator on charges relating to his conduct with this girl and was dismissed from the department. After Downes left the garage Cuffe unsuccessfully endeavored to induce the girl to leave. Upon her refusal to leave, Cuffe states that he waited until the relator, who then was on patrol duty, came along; that he informed the relator that he did not wish the girl to remain in the garage; that the relator asked the girl her name and where she lived; that she refused to give the information, stating that it was none of his business; that relator then informed her that if she did not leave before he returned he would have to arrest her; that after relator left, the girl still refused to leave; that Cuffe again summoned the relator, who asked the girl if she had no home and what she meant to do; that she replied, "Yes; it is none of your business;" that the relator said, "The best thing you can do is to go where you belong.

Second Department, March, 1912.

will be back right away;" that the relator left and five or ten minutes and then found that the girl had anwhile.

considerable conflict in the testimony as to whether actually entered the building at the times he had conversations with Cuffe and the girl. She claims that of the first visit relator entered the building without seen her and without having been summoned by that at this time she hid from the relator before he pursuant to a direction from Cuffe, and that only had entered the building did Cuffe inform him that the building and request him to put her out. She that when she first spoke to relator she informed owners had brought her to the building after her sexual intercourse with her. Her testimony is uncorroborated and is denied by both the wife. Aside from these uncorroborated portions, her account of the events in the garage is the same as the stories told by Cuffe and the relator. On direct examination, stated that relator came to deal with the girl, and on his cross-examination the relator entered the building at all. The relator remained in the street, standing at the third floor, talking to Cuffe and the girl, without entering. It is conceded that the relator made no reportings.

Determination of the question whether the relator's garage was evidently deemed of great importance bearing upon the truth of charges 1 and 2, that he had entered the building for other than police purposes, made no report of such desertion from his post. Examination of the witnesses was devoted to an attempt to determine the truth of this matter, and the trial deposed the trial in order that he might obtain stenographic previous examination of the relator in the disbarred office on that subject. Those stenographic minutes, established, established that the relator had told the stenographer that matter at the district attorney's office during the trial of these charges.

App. Div.]

Second Department, March, 1912.

The fact that the relator did enter the building may, perhaps, be regarded as supported by sufficient evidence. We do not, however, consider that the fact of such entry, in view of the evidence in the record, sustains, or even tends to sustain, charges 1 and 2. Paragraphs 14 and 15 of rule 45 of the rules and regulations of the police department contain the provisions which, it is claimed, were violated by the relator when he entered the garage and failed to report such entry. Those paragraphs read as follows:

"Paragraph 14. Patrolman while on duty must not enter any house nor leave their (*sic*) post, except in discharge of Police duty. If required by any person under any circumstances to leave post in the discharge of Police duty, they will, except in great emergencies, first enter in their memorandum book the time and at whose request they leave post, as follows: 'Left post at o'clock at request of,' and will complete the entry of the facts of leaving post and the time of their return thereto as soon as they have returned to post.

"Paragraph 15. They will also report the same to the first Lieutenant or Sergeant of their Precinct whom they may meet thereafter, giving the time and circumstances of such call, and the time of return to post. They will also make report at the Station-house."

It appears from an inspection of these rules that the patrolman is not forbidden to enter a house or leave his post "in the discharge of police duty." Manifestly, if the relator entered the garage to investigate Cuffe's story regarding the girl, such entry was in discharge of police duty and not a violation of the rules. The only testimony that he did not enter for that purpose is the uncorroborated statement of the girl. Despite her tender years, her debased character is such that her uncorroborated statements cannot be deemed sufficient to sustain such an accusation as is the subject of this investigation. (*Moller v. Moller*, 115 N. Y. 466; *People v. Donohue*, 114 App. Div. 830, 833; *Osborne v. Seligman*, 39 Misc. Rep. 811.) Moreover, it appears from these rules that the patrolman is required to make a report only when he has left his post. There is no evidence in the record to show that relator's entry of the garage constituted a leaving of his post. On the contrary,

Second Department, March, 1912.

timony adduced on that subject established the fact
garage was covered at the time in question by
st. Inspector Titus, the complainant,
Q. Were both these officers [Downes and
the 39th Precinct on January 22nd and
ere, sir. Q. What tour did Downes
l the first tour; the post he covered was
, and $\frac{1}{2}$ of 3. Q. Did it cover this ga
* * * Q. What tour did Leonard
d from 2 A. M. until 8 A. M. of January

settled that in order to sustain grave ch
presented, there must be positive and no
e of each material element of the offens

Roe v. Maclean, 57 Hun, 141; *Peop*
v. Welles, 5 App. Div. 523; *People ex rel.*
, 127 id. 49.) As the record stands, the
whatever to show that the relator was ab
le in the garage, and the uncorroborated s
that he entered the garage without hav
by Cuffe, if entitled to any weight, is in vi
character merely a scintilla, quite insuff
determination of the police commissioner.

e v. Martin, 142 N. Y. 352, 356.)

The testimony relates to the first and second
ing to the third charge, that relator did n
e action upon finding the girl in the garage is n
or conflicting. On that testimony the le
the respondent contend that the relator should
ited of failing to take proper police action; tha
ould have conducted a more thorough investig
the girl's character and antecedents when he f
the garage with Cuffe, and should not have
at that early morning hour after having me
her to go home under threat of arrest if he fo
oon his return. On the other hand, it is conter
ed counsel for the relator that he had a right
judgment; that he could not take the girl into
t a complaint and a complainant against her.

App. Div.] Second Department, March, 1912.

that no overt act was committed by her in his presence warranting her arrest. Assuming but without deciding that the third charge has been proven, it is obvious that the trial deputy and the commissioner may have been influenced in convicting the relator thereof and in sentencing him to the extreme penalty of dismissal by an erroneous belief that he had also been proven guilty of concealing the events at the garage in violation of the rules of the department. The relator's previous record in the police department appears to be good, and we are of opinion, in view of all the facts, that the ends of justice will be best subserved in this case by reversing the determination of the police commissioner because of the erroneous decision of the first and second charges, and because of the possible effect of that error upon the determination of the third charge and upon the punishment inflicted, and by directing a new trial of these charges before the present commissioner or one of his deputies. (See *People ex rel. Reardon v. Partridge*, 86 App. Div. 310.)

The determination should be reversed, without costs, and a new trial directed in accordance with the views herein expressed.

JENKS, P. J., CARR, WOODWARD and RICH, JJ., concurred.

Determination reversed, without costs, and new trial directed in accordance with opinion.

JAMES ANDERSON, Respondent, *v.* McNULTY BROTHERS, Appellant, Impleaded with WINSLOW BROTHERS COMPANY and THOMPSON-STARRETT COMPANY, Defendants.

Second Department, March 15, 1912.

Negligence—*injuries caused by falling joist—action by iron-worker against codefendants—complaint—evidence—contributory negligence.*

A complaint in an action by an ironworker against a general contractor and two sub-contractors to recover for injuries received while working in an elevator shaft on a scaffold at the sixth floor, which, after the usual statements, alleges that "the scaffold or planking on which he was standing was struck violently by a heavy wooden joist that was allowed to and did drop down and through said elevator shaft from above the plaintiff and from about the tenth floor of said building, through

Second Department, March, 1912.

son of the fault, carelessness and negligence of the defendant, agents, servants and employees," thereby causing the defendant to give way and precipitating the plaintiff down the shaft, states of action.

In an action for negligence which states the act or omission to injury, with a general allegation that such act or omission is the defendant's negligence, is sufficient.

In action there must be sufficient evidence of negligence independent of the presumption caused by the falling of the object to the wrongdoer.

was not guilty of contributory negligence, as matter of law, in failing to build a cover over his scaffold.

by the defendant, McNulty Brothers, from the Supreme Court in favor of the plaintiff, the clerk of the county of Kings on the 15th day of January, 1911, upon the verdict of a jury for \$12,500. An order entered in said clerk's office on the 15th day of January, 1911, denying the said defendant's motion to set aside the judgment made upon the minutes.

Worden [Amos H. Stevens with him on the appeal] for the appellant.

J. McCrossin, for the respondent.

G. J.:

The plaintiff is to recover damages for personal injuries sustained by an ironworker, was seriously injured on April 15, 1910, while working in an elevator shaft in a building then under erection at 123 William street, in the borough of Manhattan.

He was employed by the defendant Thompson-Starrett Company, a corporation having the contract for the construction of the iron work in the building. The appellants, however, had the contract for a certain portion of the work. The defendant Thompson-Starrett Company was the contractor. At the time of the accident the plaintiff was working on a scaffold at the sixth floor, in one of the elevator shafts. The accident was caused by a joist or platform falling from some point in the shaft above that plaintiff was working and breaking one of its outriggers, thereby precipitating the plaintiff down the shaft. The complaint is directed to the Thompson-Starrett Company, and the

App. Div.] Second Department, March, 1912.

was submitted to the jury on the plaintiff's claim against the other two defendants. The jury returned a verdict in favor of the Winslow Brothers Company and found against McNulty Brothers.

The appellant raises the preliminary objection that the complaint fails to state facts sufficient to constitute a cause of action against it, in that it only avers a legal conclusion of negligence. The complaint alleges that the appellant McNulty Brothers is and was a domestic corporation engaged at the time in the performance of certain plastering work in said building, and that while the plaintiff was working in the elevator shaft in said building "the scaffold or planking on which he was standing was struck violently by a heavy wooden joist that was allowed to and did drop down and through said elevator shaft from above the plaintiff and from about the tenth floor of said building, through and by reason of the fault, carelessness and negligence of the defendants, their agents, servants and employees," thereby causing the scaffolding to give way and precipitating the plaintiff down the shaft. The pleader has alleged the specific fact upon which the appellant's negligence is predicated, namely, the dropping of the joist down the shaft, and has stated generally that the dropping of the joist was due to the negligence of the appellant, its agents, servants and employees. Such a pleading clearly states sufficient facts to constitute a cause of action against the appellant. (*Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 310; *Roblee v. Town of Indian Lake*, 11 App. Div. 435; *Pagnillo v. Mack Paving & Const. Co.*, 142 id. 491.)

The *Pagnillo Case* (*supra*), relied upon by the appellant, does not sustain its contention. There the complaint merely contained a general allegation of negligence, without stating any facts upon which said negligence was based, or which resulted from the negligence, and caused the injury complained of. The case, however, correctly states the rule that the complaint is sufficient if it states the act or omission causing the injury, with a general allegation that such act or omission was due to the defendant's negligence. In *Fahr v. Manhattan R. Co.* (9 Misc. Rep. 57), also relied upon by the

Second Department, March, 1912.

Second Department, March, 1912.
The allegations of the complaint affirmatively establish
negligence.

such as the one at bar it is well settled that there was sufficient evidence of negligence, independent of the cause of the falling of the object, to identify the plaintiff's employees. At the time of the accident two scaffolds in the elevator shaft above the scaffold on which the plaintiff was working. One was on the plaintiff, but was not large enough to support him. The other scaffold was on the scaffold used by the appellant's employees in plastering. It completely covered the shaft and was being used by two employees of the Winslow Brothers Company. It was made of planks placed closely together, resting on joists four by four and about nine inches apart at each end by which they were anchored to either side of the shaft. This scaffold was erected at the time of the accident, pursuant to the direction of the appellant's foreman in charge of the plastering. The cause of the accident was identified as a nail in this scaffold, and was found after the scaffold had disappeared, although it was observed

These joists do not appear to have been
any one except the appellant and its em
e was sufficient testimony to warrant the J
the joist which struck the plaintiff's s
he joists that had been used in the app
ch finding placed the burden upon appell
it had not been guilty of negligence in c
e fall of the joist. (*O'Rourke v. Waite* C

iff was not guilty of contributory negligence, in neglecting to build a cover over his scaffold shows that there was no regular custom in

App. Div.] Second Department, March, 1912.

respect but that the matter was left to the judgment of the men. At the time of the accident the plasterers were engaged merely in removing their scaffold. The small scaffold used by the other ironworkers on the eighth floor was directly over the plaintiff's head, although it did not cover the outriggers of his scaffold. In the circumstances it was for the jury to determine whether the plaintiff's failure to completely cover his scaffold constituted contributory negligence.

The judgment and order should be affirmed.

Present — JENKS, P. J., HIRSCHBERG, THOMAS, CARR and RICH, JJ.

Judgment and order unanimously affirmed, with costs.

EMILY S. CONCKLIN, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Second Department, March 15, 1912.

Real property — suit to enjoin railroad company from maintaining fence across right of way — adverse user of property devoted to public purpose — deed — effect of restrictions in habendum clause — covenant to build fences affirmative — breach of covenant as ground for prescriptive right.

Where, in a suit to enjoin the defendant, a railroad company, from maintaining a fence recently constructed across a right of way which the plaintiff claims to have acquired by prescription, it appears that during the last fifty years plaintiff and his predecessors and others have reached the highway by walking along the side of defendant's tracks and across the same in front of a station, and that this user has been open, visible, continuous, peaceable, uniform, uninterrupted and with the knowledge of the defendant, the plaintiff's user is not sufficient to create a prescriptive right of way over the defendant's property which is devoted to a public purpose and freely resorted to by the public.

It seems, that the plaintiff's use is permissive rather than adverse, and not such as would constitute notice to the defendant of an adverse claim.

More definite and distinctive acts of adverse user are necessary to establish a right of way over unfenced property appurtenant to a railroad station and commonly and openly frequented by the general public than are required to raise a presumption of a right of way over property devoted solely to private purposes.

Second Department, March, 1912.

ment in a habendum clause of a deed that property is to be held for road purposes does not limit the fee conveyed and, it seems, that grantee may convey the fee.

Covenant to build fences is an affirmative one running with the land. Of such covenant to build fences constitutes a wrongful act and be the foundation for a prescriptive right.

AL by the plaintiff, Emily S. Concklin, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Dutchess on the 17th January, 1911, upon the decision of the court rendered at the Dutchess County Special Term.

Henry Egginton [H. S. Concklin and Charles C. Egginton, on the brief], for the appellant.

Albert Wilkinson, for the respondent.

BERG, J.:

Action is brought to enjoin the defendant from placing a fence across a right of way which the defendant claims to have acquired by prescription over the defendant's premises in the village of Amenia, Dutchess County. The facts are not disputed. One John B. Barker is the true source of title to all the property involved. In 1872 he conveyed a narrow strip of land, 1,568 feet long, running through his farm, to the New York and Harlem Railroad Company. The deed of conveyance contained the following clause: "To have and to hold the same to the second part [the railroad company], their assigns forever, for the purposes of the extension of the New York & Harlem R. R. as directed in the several Acts of the Legislature of the State of New York in relation thereto." In addition to this habendum clause and the covenants of title, the deed contained a covenant whereby the grantor agreed for himself, his heirs and assigns, to maintain good and sufficient fences on both sides of the strip of land; and a covenant whereby the grantee agreed to "make and maintain good, sufficient and convenient places across said Railroad to and from the land of the first part on each side of said strip of land for said railroad, pursuant to the Acts of the Legislature."

App. Div.] Second Department, March, 1912.

ture in relation thereto." By lease made in 1873 for a period of 401 years, the respondent became the lessee of the New York and Harlem Railroad Company and as such is now in possession of the property in question, operating a steam railroad over the same and maintaining a station for its passengers on a part thereof in the village of Amenia. In September, 1852, Barker conveyed approximately half an acre lying south of and adjoining the railroad property to appellant's predecessor in title. The dwelling thereon now used by the appellant as a residence was erected in 1853.

In 1856 Barker conveyed a parcel of land lying west of and adjacent to appellant's premises and southerly of and adjoining the railroad property to Enoch G. Caulkins. Those premises lie between the plaintiff's lot and a public highway known as Mechanic street, which crosses the railroad tracks at right angles and leads into the village of Amenia. The Caulkins property is now owned by one Lewis E. Barton, who maintains a hotel thereon.

The covenant to fence, made by plaintiff's predecessor, has never been performed. During the last fifty years appellant's predecessors and the appellant, as well as their servants and visitors, have reached said highway from the premises by walking along the southerly side of said railroad premises and across the same in front of the station to the highway. This user has been open, visible, continuous, peaceable, uniform, uninterrupted and with the knowledge of the respondent. A similar use of the railroad property seems also to have been made by the owners of the premises adjoining the appellant's property. In 1906 the respondent built a fence along the south line of its property, thereby closing the alleged right of way. From the judgment refusing to enjoin the maintenance of that fence the plaintiff appeals.

It has been suggested that as a railroad company possesses merely an easement for railroad purposes, and that as the land reverts to the original owners upon the abandonment of the railroad franchise, it is incapable of conveying a fee, and hence the presumption of a lost deed as the basis of a prescriptive right cannot be indulged against it. (See *Roberts v. Sioux City & Pacific R. R. Co.*, 73 Neb. 8; 2 L. R. A.

Second Department, March, 1912.

272; *Southern Pacific Co. v. Hyatt*, 132
. 522; *Missouri, K. & T. Ry. Co. v.*
4; 14 L. R. A. [N. S.] 592; *Northern*
Cly, 197 U. S. 1; *Northern Pacific Railw*
(*id.* 267.) In the case at bar, however, t
not acquire the property in question by
ceedings in the exercise of the power

The deed from Barker vested it wit
N. Y. & E. R. R. Co., 12 N. Y. 121;
24 Hun, 478; *Beal v. N. Y. C. & H. R.*
2; *Yates v. Van De Bogert*, 56 N. Y. 526.)

the habendum clause that the property wa
purposes did not limit the fee conveyed.

Co., 106 N. Y. 283; *Nicoll v. N. Y. & E.*

It would seem, therefore, that the responder
the fee of the property. I do not, however,
to determine whether the respondent could
property in such a manner as to interfere w
exercise of its public franchise, or whether an e
acquired by prescription in such premises, if sa
any way interfered with the proper exercise
, because I do not believe that the appellant ha
ed that her user of the premises in questi

Her contention is that the open, visible, not
e, continuous and uninterrupted use of the w
rs raises a presumption of aduerseness, unless a
own by the respondent to have been by licens
support of such contention are *Hammond v.*
(118); *Colburn v. Marsh* (68 Hun, 269; affd. or
y, 144 N. Y. 657); *Hey v. Collman* (78 App. Div.
N. Y. 560); *Miller v. Garlock* (8 Barb. 153); *Ni*
worth (100 N. Y. 455); *Winne v. Winne* (95 App.
nsend v. Bissell (4 Hun, 297); *Law v. McDono*
and *Schwer v. Martin* (29 Ky. L. Rep. 1221).

uzing these cases in detail, it is sufficient to say
distinguishable from the case at bar in that they
ances where the right was acquired over pro
solely to private purposes, and where, conseque
ite or distinctive acts might be held sufficient to

App. Div.] Second Department, March, 1912.

a presumption of adverse user than would be required in order to establish a right of way over unfenced property appurtenant to a railroad station and commonly and openly frequented by the general public.

User of grounds thrown open to the public in connection with the use of a public or quasi-public building is ordinarily to be considered permissive and not adverse, unless there be some distinctive act indicating a separate and exclusive use under a claim of right sufficient to notify the owner, not only of the user *but of the claim of right*. (See Jones Ease. § 285, and cases cited.) While there do not seem to be any authorities precisely in point with the facts in the case at bar, the trend of judicial decisions seems to be towards a holding that such a user as the plaintiff's is not sufficient to create a prescriptive right of way over property devoted to a public purpose and freely resorted to by the public. The record contains no evidence of any decisive act upon the plaintiff's part indicating a separate and exclusive use from which knowledge of a claim of right could be presumed by the respondent. (*Kilburn v. Adams*, 7 Metc. 33; *Inhabitants of Gloucester v. Beach*, 2 Pick. 59; *Plimpton v. Converse*, 44 Vt. 158; *Strong v. Wales*, 50 id. 361; *Burnham v. McQuesten*, 48 N. H. 446.) In *Kilburn v. Adams* (*supra*) it appeared that the plaintiff owned lands adjoining property upon which was situated an academy, and claimed a right of way from his land over the academy lot to a highway. The academy land had been left open during many years and crossed in all directions by the general public. The court held that although the plaintiff made more frequent use of the land than others, such use was not inconsistent with the proprietor's rights and could not be the basis of an easement by prescription in the absence of some decisive act on the plaintiff's part indicating a use separate and exclusive from the general use. To the same effect in principle is the recent decision of this court in *New York Central & H. R. R. Co. v. Village of Ossining* (141 App. Div. 765), wherein it was held that the mere use of a way opened to the public by a railway company did not operate to dedicate the land to the public as a highway.

Within the principle of the cases herein referred to, I think

Second Department, March, 1912.

plaintiff's use was permissive rather than adverse, and would constitute notice to the respondent of a change in its ownership of the property, and I agree with the language of the learned trial justice (Mr. Justice) that the opinion rendered herein at the Special Term, does not appear to me that a railroad company, by lands about one of its stations open and unfenced in time, is submitting to an adverse use of a right-of-way, because a neighboring landowner drives cattle to and from his own premises. No authority of law to the contrary effect is cited. The instances of such a lateral use continued for a much longer period than twenty years than throughout the country, and it seems quite clear that no precedent directly upon the point has been or at least found by the counsel. The user of the plaintiff's predecessor must be deemed upon the facts to have been permissive and under an implied license,

It is further noted that the appellant has no right to claim necessity, as the original Barker deed grants the highway distinct from the way claimed.

The conduct of the plaintiff and her predecessor to build fences along the respondent's line pursuant to the terms of the Barker deed does not tend to establish a prescriptive right. The covenant was an affirmative one, running with the land, and the operation of the Statute of Limitations does not commence until demand and refusal. (Bronx v. Mass. 175, 188; *Talmadge v. R. & S. R. R.* 493, 498.) The alleged breach of this covenant does not constitute such a wrongful act as could not be relied upon for a prescriptive right. (*Thomas v. Marsden* 100, 248.)

Plaintiff's judgment should be affirmed.

P. J., THOMAS, CARR and RICH, JJ., concurred,
and the judgment affirmed, with costs.

App. Div.] Second Department, March, 1912.

MARTINO DI STEFANO, Respondent, *v.* **PEEKSKILL LIGHTING AND RAILROAD COMPANY**, Appellant.

Second Department, March 8, 1912.

Practice—security for costs—removal of plaintiff from State—laches—amount of security.

Where, at the time of the commencement of an action for negligence, the plaintiff resided in the county of Westchester, but pending an appeal from a judgment of nonsuit resulting in a new trial returned to Italy, an application by the defendant's attorney, upon hearing that plaintiff was about to return to this State after a period of six years, for an order requiring him to give security for the costs on the ground that he had ceased to be a resident of the State should not be denied on the ground of laches, it having been substantially agreed between the attorneys that the matter should remain dormant until the plaintiff returned.

An order requiring security for costs in an amount double that authorized by sections 8272 and 8273 of the Code of Civil Procedure is irregular and should be reversed.

APPEAL by the defendant, the Peekskill Lighting and Railroad Company, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 18th day of October, 1911, vacating an order requiring the plaintiff to give security for costs.

Nathan P. Bushnell, for the appellant.

Frank L. Young, for the respondent.

HIRSCHBERG, J.:

The action is for negligence, brought by a servant in the employ of the defendant. At the time of the commencement of the action the plaintiff was a resident of the county of Westchester, where the venue is laid. The case was tried on the 9th day of March, 1904, and resulted in a nonsuit. On appeal to this court the judgment was reversed and a new trial granted. (See *Di Stefano v. Peekskill Lighting & R. R. Co.*, 107 App. Div. 293.) Before that decision was rendered the plaintiff left the State of New York and returned to Italy, the place of his nativity. The plaintiff's attorney learned of his client's departure in the fall of 1905, and promptly notified the

I STEFANO v. PEEKSKILL LIGHTING & RAILROAD CO.

Second Department, March, 1912.

[Vol. 149.]

y for the defendant of the fact. Since ~~that time nothing~~ been done by either side in the suit, it being substantially agreed between them that the matter should remain suspended until the plaintiff returned to this State. Plaintiff's attorney learned in August, 1911, that the plaintiff was about to return to this State, and he thereupon communicated with defendant's attorney informing him of that fact. The defendant thereupon procured an *ex parte* order requiring the plaintiff to pay into court the sum of \$500 as security for the continuation of the action, or at his election to file an *undertaking* in the amount. On motion of the plaintiff and *on affidavits* setting forth fully the history of the litigation as herein set forth, the appeal appealed from was granted by the same learned justice who made the *ex parte* order vacating the latter order. The main ground asserted in support of the order appealed from was that the defendant was guilty of laches in failing to sue and thereby lost all right to require security. There are numerous in support of the proposition that application for security must be made promptly. However, that the rule can be made to apply where the delay is the result of a mutual understanding between the parties. (See *Cooke v. Metropolitan Life Ins. Co.*, App. Div. 154.) This view would lead to a reasonable result but for the fact that the original order requiring security was irregular in that the amount required was not authorized by the Code of Civil Procedure (§§ 327, 328). Those sections provide that the amount directed to be paid into court shall be the sum of \$250 only and that the undertaking hereof shall be conditioned in a sum of at least \$250, the maximum amount to be obviously in the discretion of the court.

In view of the irregularity of the order vacated the judgment from should be affirmed, without costs, but will be remanded to a timely renewal of the application for security.

P. J., BURR, THOMAS and CARR, JJ., concurred.

affirmed, without costs, but without prejudice to a timely renewal of the application for security on notice.

App. Div.] Second Department, March, 1912.

AUGUST BOHNHOFF, Respondent, v. HENRY C. FISCHER, Appellant, Impleaded with WILLIAM KENNEDY.

Second Department, March 8, 1912.

Negligence — defective scaffold erected by general contractor — liability to employee of sub-contractor — Labor Law, section 18, construed.

A sub-contractor, who does no act in reference to the furnishing of materials or the construction of scaffolds, but merely sends his employees to a building where they use the scaffolds erected by the general contractor for the use of his own employees, is not liable under section 18 of the Labor Law, if the scaffold falls.

It seems, that if it becomes necessary for a sub-contractor to construct scaffolds he will be charged with the duty of complying with the statute.

A sub-contractor has the right to assume that the platforms or scaffolds which have been constructed and which are in common use when he or his servants come upon the work have been constructed so as to comply with the provisions of the statute.

It seems, that whoever assumes the duty of constructing the scaffolding for the general purposes of the construction of a building must, under the statute, assume the responsibility for their materials and construction, so long as they are maintained for that purpose, and that any one lawfully at work on such building, using the scaffolds, must look to the person who furnished the materials or who had charge of the construction for any liability under the statute.

BURR and RICH, JJ., dissented.

APPEAL by the defendant, Henry C. Fischer, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 6th day of April, 1911, and also from an order entered in said clerk's office on the 7th day of April, 1911, denying the said defendant's motion for a new trial made upon the minutes.

George F. Hickey [Charles E. Thorn with him on the brief], for the appellant.

Henry M. Dater [George F. Elliott and Jay S. Jones with him on the brief], for the respondent.

WOODWARD, J.:

This action was originally brought against William Kennedy, the general contractor, engaged in the construction of

Second Department, March, 1912.

[Vol. 149.]

a building at 14 Smith street in the borough of Brooklyn. Subsequently the defendant Fischer was brought into the action, and the prosecution of the case against Kennedy appears to have been dropped. The amended complaint alleges that "on or about the 9th day of June, aforesaid [1905], the plaintiff was in the employ of the defendant, Henry C. Fischer, and engaged as an iron worker for said defendant, Henry C. Fischer, in doing certain work on said building, as aforesaid, and without any fault on his part, but solely through the fault, carelessness and negligence of the defendant, William Kennedy, and in the defendant, Henry C. Fischer, who was employed in the erection, repairing or altering of said building, and servants, as plaintiff was walking over and planking placed by said defendants, their agents and furnished by them, and due solely to the negligent manner in which the same was laid, the plaintiff caused to be thrown," etc. The answer of the Fischer is a general denial of the material facts, and a negative defense of contributory negligence on the part of the plaintiff.

It appears from the evidence that Kennedy was the contractor in the construction of the building, and defendant Fischer was a sub-contractor for the construction of the ironwork. The building was near completion, the roof was on, and the work under way at the time of the accident was the construction of a pent house, a platform above the main roof for the accommodation of the machinery. This pent house was about twelve feet square, upon the roof, and Kennedy's employees, who were also working upon this part of the structure at the same time, constructed a runway by placing two planks with one end upon the main roof and the other upon wooden horses, or two other planks running from these horses to the pent house, where Kennedy's men were laying brick and mortar, while defendant Fischer's men were placing the last of the ironwork. The evidence is undisputed that this runway was constructed and maintained by Kennedy's employees, and that it was used in common by the employees of Kennedy and of Fischer, and the broad question up

App. Div.] Second Department, March, 1912.

appeal is whether the defendant Fischer is to be charged with responsibility, under the provisions of section 18 of the Labor Law. (See Gen. Laws, chap. 32 [Laws of 1897, chap. 415], § 18; now Consol. Laws, chap. 31 [Laws of 1909, chap. 36], § 18, as since amd. by Laws of 1911, chap. 693.) We are admonished by the Court of Appeals that in the construction of this act we are to "endeavor to ascertain its fair and reasonable meaning, avoiding a construction which either extends or limits its provisions beyond that which was evidently intended." (*Schapp v. Bloomer*, 181 N. Y. 125, 128.) We must examine the language, therefore, and determine whether a sub-contractor, doing no act in reference to the furnishing of materials or the construction of a scaffolding, but who merely sends his employees to a building to do certain work, and they make use of the structures erected by the general contractor for the use of his employees in work of a like general nature, is liable under this section of the Labor Law if such scaffolding falls and results in injury to his employees. It has been generally understood that the primary purpose of this act was to charge the master, who already owed the duty of furnishing reasonably safe materials and appliances, with the additional duty of seeing to it that the scaffolding used in the construction and repair of buildings, was properly constructed. In other words, the scaffolding was taken out of the class of implements and appliances, and placed in that of a place in which to perform the labor, extending the rule from that of reasonable care to one which shall "give proper protection to the life and limb of a person so employed or engaged." It could not have been the intention of the Legislature to require that every sub-contractor must, at his peril, construct a scaffolding for each new group of men who should be employed in the construction of a building, where such scaffoldings already existed, and where it was in actual use for the general purposes of the construction. It does not require any one to build scaffoldings, it simply provides that "A person employing or directing another to perform labor of any kind in the erection, * * * of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechani-

Second Department, March, 1912.[Vol. 149.]

cal contrivances which are unsafe, unsuitable or improper, and which are not so construed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged." (Labor Law, § 18.) The duty is placed upon the one who is called upon to furnish the scaffolding, hoists, stays, ladders, etc., to furnish the proper materials and to see to it that they are constructed in such a manner "as to give proper protection to the life and limb of a person so employed or engaged." Undoubtedly this language is broad enough so that if it became necessary for the sub-contractor to construct scaffolds, he would be charged with the duty of complying with this statute, but where the work is of such a character that it is being done in connection with the work of the general contractor, who has assumed the work of constructing the scaffolding, it cannot be that one who has neither furnished materials nor taken part in the construction can be held to be liable for a defect which results in an injury to his employee. The statute says he "shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding * * * which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged," and he has not done any of these things. The sub-contractor, in the practical performance of his work, must be presumed to contract with reference to the usages and customs of his trade or occupation; to contract upon the basis of the presumption that all men will do their duty toward him and all other men. Starting from this standpoint, he has a right to assume that the platforms or scaffoldings which have been constructed, and which are in common use when he or his servants come upon the work, have been constructed under the provisions of the law; that the place provided by the general contractor for the performance of the work, which now includes the proper construction of the scaffoldings, etc., complies with the degree of safety provided by law. That is, in law, the contract which the general contractor or "A person employing or directing another to perform labor," etc., entered into with the sub-contractor or other person "employed or engaged" in such labor, and we are of the opinion that the sub-contractor owes no duty

App. Div.]

Second Department, March, 1912.

to his employees in reference to the scaffoldings which are erected and maintained by the owner or general contractor in the general work of construction. It is enough if we hold the sub-contractor liable for his own neglect in the erection of these scaffoldings, etc., where he is called upon to construct them in the fulfillment of his contract. There is no presumption that the sub-contractor was obliged to construct a scaffolding in this particular case. It is far more likely that he made his contract in the knowledge of the fact that the general contractor, in the laying of the brick walls, etc., would construct the necessary scaffolding, and that the ironwork would follow this up and be done in the place furnished by the general contractor for the performance of the work of the sub-contractor. If this was the case, then the general contractor owed the duty to the sub-contractor and his servants to furnish a proper place for the performance of this work, and a failure on the part of the general contractor to meet the requirements of the statute was not negligence on the part of the sub-contractor, and the case was sent to the jury upon an erroneous theory. This was the view of the law taken by this court in the case of *Quigley v. Thatcher* (144 App. Div. 710), where a recovery against the general contractor by an employee of a sub-contractor was sustained, and although the exact question here presented was not determined, we see no reason to hold the sub-contractor liable as a joint feasor where he has not furnished or erected a scaffolding, and where the injury complained of is the result of the act of the general contractor in not furnishing a proper place, under the statute, for the performance of the labor assigned to the servant of the sub-contractor.

In *Dougherty v. Weeks & Son* (126 App. Div. 786, 789) the court say: "While evidence was excluded when first offered to prove that there was a custom by which the general contractor was to furnish ladders, no proof of custom is necessary to show that when a contractor is engaged in erecting a building and has put up the only means of access to the different floors and employs a sub-contractor to do some particular work in that building, like plumbing, that he invites him to make use of the appliances which he has furnished necessary to get to the place to do his work." (See *Duffy v. Williams*, 71 App. Div. 110.)

Second Department, March, 1912.

clear to us that whoever assumes the duty of controlling the scaffolding for the general purposes of the building must, under the statute, assume the responsibility for their materials and construction, so long as they are maintained for that purpose, and that any one lawfully working in such construction must look to the person who supplied the materials or who had charge of the construction, liability under the act. Certainly one who did not furnish materials, or have anything to do with the construction, cannot be held to answer for the conduct of one who did these things, so long as the latter maintains such structure, and uses it for their use under an expressed or implied invitation.

Judgment and order appealed from should be reversed.

P. J., and HIRSCHBERG, J., concurred; BROWN, J., dissented on the ground that if a master permits his employees to make use of a scaffold constructed by another, he has a duty to see to it that it is safe for the purpose for which it is intended to be used.

Judgment and order reversed and new trial granted. Appeal dismissed.

ROSSITER, Respondent, v. PETER COOPER'S GLUE FACTORY, Appellant.

Second Department, March 8, 1912.

Servant — negligence — injury by falling into unguarded vat — Labor Law, section 81 — waiver of statute.

Ant who fell into a vat in a glue factory while engaged in his work, knowing that guard rails furnished by the employer were in place, elected to continue to work without the rails. He disregarded the benefits of section 81 of the Labor Law requiring vats to be surrounded and assumed the obvious risks of the situation. He was not entitled to waive a rule of law, statute or constitutional protection, in view of his benefit if it is exclusively a matter of private right, and where no questions of public morals are involved; having once done so, he cannot subsequently invoke its protection.

BROWN, J., dissented.

App. Div.] Second Department, March, 1912.

APPEAL by the defendant, Peter Cooper's Glue Factory, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of June, 1911, upon the verdict of a jury for \$15,000, and also from an order entered in said clerk's office on the 23d day of June, 1911, denying the defendant's motion for a new trial made upon the minutes.

John C. Robinson, for the appellant.

Don R. Almy, for the respondent.

WOODWARD, J.:

The complaint in this action appears to have been framed on the theory that the action was one falling within the purview of the Employers' Liability Act (Labor Law [Consol. Laws, chap. 31; Laws of 1909, chap. 36], art. 14, as amd. by Laws of 1910, chap. 352), though upon the trial this view was abandoned, and the case proceeded as one at common law. The plaintiff, fifty-one years of age, had been in the employ of the defendant for thirty-three years in making glue, his occupation generally being the cutting up and preparing hides, sinews, etc., for the boiling process. Two weeks prior to the accident the plaintiff was taken from his accustomed work and placed under the direction of the foreman of the boiling house. During the two weeks the plaintiff appears to have done various kinds of work, and on the day of the accident he tells the story as follows: "Then he [O'Neil, the foreman] said he would bring me upstairs to show me the material upstairs, how it was boiled and stirred up. I followed Jerry up the stairs. I found vats there; they were filling them up. There were fourteen vats on that floor. * * * On this morning when I came up there to work at about eleven o'clock they were filling the boilers. I believe it was six boilers they were filling, six out of fourteen. They were putting all sorts of different hides or skins, as comes in in the wagon, into the boilers. In these vats they were putting these skins in, the material was left from the run that we had previously took out. * * * The process of boiling those skins is by reason of introducing the live steam

ond Department, March, 1912.

roducing the live steam into the boilers or
ld me that when I should come back from
d stir up those skins. I went out to din-
about one o'clock. When I came back I
Neil. Mr. O'Neil pointed to number four
ould find a pole in that and to stir them
d in stirring up these skins the plaintiff in
s balance and fell into the boiling vat, sus-
painful and more or less permanent char-
jury has awarded him a verdict of \$15,000.
entered upon this verdict and from the
endant's motion for a new trial or
ppeals.

ence in this case of any failure or
provide reasonably safe tools a
f any failure on the part of the
ably safe place for the plaintiff to
that may follow from the failur
t to guard the vats in violation of
81 of the Labor Law (Conso
909, chap. 36], as amd. by Laws
ovides that "all vats, pans, saws,
g, shafting, set-screws and mach
shall be properly guarded." Ind
lling attention to the charge of t
that "it appears that the case
ury upon the question as to wh
had failed to give the plaintiff
ether or not the defendant was
iling to provide the plaintiff wi
nances." As to these matters, th
e master has discharged his duty i
e can be no liability on the part o
f any alleged failure in respect to
of the master. It affirmatively app
that the defendant had supplied gu
s; that such guards were in the room
I went there, and that one guard at le
me to the notice of the plaintiff before

App. Div.] Second Department, March, 1912.

began the work, and at common law this would be a complete performance of the duty of the master to supply reasonably safe appliances. It appears, however, that in spite of the provisions of the statute that "No person shall remove or make ineffective any safeguard around or attached to machinery, vats or pans, while the same are in use, unless for the purpose of immediately making repairs thereto, and all such safeguards so removed shall be promptly replaced," some one had taken the guard from around the particular vat where the plaintiff was put to work, and the case was submitted to the jury upon the theory that, this guard not being in place, the jury might find the master liable if such displacement of the guard was the cause of the accident.

There are two difficulties in sustaining this verdict. In the first place the plaintiff's testimony, which is all there is as to the happening of the accident, is to the effect that he was drawn into the vat by the pole which he was using through some unexplained cause; through a cause which he appears to be wholly unable to suggest, and which, so far as the record goes, never occurred before or since the accident. There is not the slightest evidence that the absence of the guard rail had anything to do in producing the accident; the proximate cause of the accident was not that there was not a railing in front of this tank or vat, but that the pole which the plaintiff was using, and which appears to have been merely an ordinary stick eight to ten feet in length, for some unexplained reason exerted a drawing force upon the plaintiff sufficient to overbalance him and cause him to fall into the vat. There is no evidence to suggest how strong this drawing force may have been; no evidence to show that it was not strong enough to have produced the same result even had the barrier been properly placed, for in the practical work of stirring up a large vat filled with hides and scraps the guard rail could not have been very high, and the testimony is to the effect that it was about thirty-two inches, or rather below the middle of a man of ordinary height. The question of the duty of the defendant to give the plaintiff instructions being out of the case, it being assumed that the simple pole was a proper tool or appliance, for this question was not submitted to the jury, it is difficult to

Second Department, March, 1912.[Vol. 149.]

understand how a jury could properly find that the failure to have the guard rail in place was the proximate cause of the accident, when the only evidence in the case is that the accident was caused by some drawing power exerted upon this stick. Of course, if this drawing power was strong enough to overbalance the plaintiff, it might have overbalanced him if there had been a low railing intervening, in which event there could be no possible liability on the part of the defendant, unless the danger to be apprehended from the exertion of the drawing power was one which it was the master's duty to apprehend and guard against, and this could only arise by showing that the danger was one inhering in the business or occupation, and which was known or should have been known to the defendant, while not obvious to the ordinary inspection of the employee. No one attempts to say what this drawing force was, and as the evidence shows that this boiling house had been in operation for at least eighteen years, it is fair to presume that if this danger had been a recurring one, or one incident to the work, some evidence of the fact would have been produced. As it is, the court instructed the jury that the defendant owed the plaintiff no duty of instructing him as to the danger of falling into the vat, so that the case presents no element of a failure to disclose inherent dangers known to the master and unknown to the servant.

Assuming, however, that the absence of the guard rail was the proximate cause of the accident, the plaintiff, so far as appears, was a reasonably intelligent man. He knew as well as the defendant could possibly have known that to fall into a vat of boiling materials was dangerous; he knew that there was no guard rail; the fact was open and obvious, and his attention was called to the fact by his observation that there was such a railing around one of the fourteen tanks in the room at the very time that he went to work. He testifies to this, and he says he did not think a railing was necessary; that he did not ask for one because he did not think they had one for him, etc. The evidence shows that these guard rails were provided; that they were in the very room where the vat was located, and there is no suggestion that any one refused to permit of their use. The plaintiff knew all of the dangers of

App. Div.] Second Department, March, 1912.

the situation which it was the master's duty to know, so far as the record discloses. He must be presumed to have known that the law required these guard rails; that he had a right to have them for his own protection, yet with his attention called to the matter particularly, he elected to go to work without the railing, and by this he must be assumed to have waived the benefits of the statute and to have assumed the risks incident to the open and obvious dangers of the situation. That a party may waive a rule of law, or a statute, or even a constitutional provision, enacted for his benefit or protection, where it is exclusively a matter of private right and no considerations of public morals are involved, and having once done so he cannot subsequently invoke its protection, is too well established to be questioned. (*Mayor, etc., v. Manhattan R. Co.*, 143 N. Y. 1, 26, and authorities there cited.) The requirement of this statute for a railing in position is in addition to the common-law duties of the master, but the servant has a perfect right, in the full knowledge of the law and the facts, to waive this additional protection, and, under the circumstances disclosed by the evidence in this case, we are of the opinion that the statute was waived and that the plaintiff, having established no possible cause of action outside of the statute, is not entitled to recover.

The judgment and order appealed from should be reversed and a new trial granted, costs to abide the event.

RICH, J., concurred; JENKS, P. J., and BURR, J., concurred on the last ground stated in the opinion; HIRSCHBERG, J., dissented.

Judgment and order reversed and new trial granted, costs to abide the event.

SHUTE v. CITY OF NEW YORK.

[Vol. 149.]

Second Department, March, 1912.

WILLIAM SHUTE, Respondent, v. THE CITY OF NEW YORK,
Appellant.

Second Department, March 15, 1912.

al corporations — negligence — injury to city surveyor — defec-
tive ladder not furnished by defendant — when city not liable —
complaint not bringing case within Employers' Liability

on law a ladder is a simple appliance which a servant uses on his
responsibility. The obligation of a master to furnish safe ladders
is created by section 18 of the Labor Law.

A servant employed by the city of New York who while running a trans-
portation line was directed by one of his superiors to get upon a building by
means of a ladder which was found in the vicinity, but was not fur-
nished by the city as part of the engineering equipment, cannot recover
from the city for a violation of section 18 of the Labor Law because the
ladder was not furnished and he was injured.

Plaintiff in an action to recover for such injuries which he sustained through the negligence of the defendant and its servants, "acting as superintendence or acting as superintendent," the plaintiff, does not bring the case within the Employers' Liability Act. There is no allegation that the alleged superintendent was acting as superintendence or that his "sole or principal duty" was that of superintendence.

JUDGMENT by the defendant, The City of New York, affirmed in the Supreme Court in favor of the defendant, and from the judgment in the office of the clerk of the county of Queens, dated January 25, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 26th day of January, 1911, denying the defendant's motion for a new trial made upon the minutes.

Counsel for Plaintiff: *Frederick Farley [Harry Crone and Archibald R. Williams]*, for the appellant.

Counsel for Respondent: *Zephaniah A. O'Leary*, for the respondent.

Judge: *WARD, J.:*

Plaintiff has framed his complaint upon a rather narrow conception of the Employers' Liability Act, and the court is entitled to have gone to the jury in harmony with the

App. Div.] Second Department, March, 1912.

plaint. After setting out the time of the accident the complaint alleges that the plaintiff was in the employ of and working for the said defendant in a certain surveying corps at or near certain premises known as the Prairie Grass Furniture Company, at Glendale, L. I., city of New York, and that "at the time and place aforesaid, plaintiff, through the negligence of the defendant and its servants exercising superintendence or acting as superintendent, was severely injured," etc., and that "On information and belief, the aforesaid negligence of the defendant and its servants consisted in furnishing and maintaining defective ways, works and other appliances connected with or used in the business of the said defendant; in failing to see and maintain the said ways, works or other appliances in a safe and proper condition; in failing to furnish plaintiff with a safe place to work; in failing to warn the plaintiff of the defective and dangerous condition thereof, and directing the plaintiff to work thereon; in furnishing plaintiff with an insecure, unsafe and defective ladder, and in failing to properly inspect, discover, remedy and maintain the same so that plaintiff could safely and securely perform his work." The complaint then alleges that by reason of the aforesaid premises and the result thereof, the said ladder upon which plaintiff was engaged broke, and plaintiff was thrown or caused to fall a distance of about twelve feet, receiving bodily injuries as aforesaid. Then the service of the notice required by the statute is set up, and the plaintiff demands judgment.

A ladder at common law is a simple appliance, which the servant uses with the same degree of responsibility that he handles a lever, a wheelbarrow or any other simple contrivance, and the only modification of this rule is to be found in the provisions of section 18 of the Labor Law, which provides that "A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper

Second Department, March, 1912.

[Vol. 149.]

tection," etc. (See Gen. Laws, chap. 32 [Laws of 1897, p. 415], § 18; now Consol. Laws, chap. 31 [Laws of 1909, p. 36], § 18, as since amd. by Laws of 1911, chap. 693.) Obviously the present case does not come within the statute, it appears here that the plaintiff was a part of a corps of surveyors, running lines across country, in nowise connected with the construction of any building. A ladder is a tool or appliance, and it is the duty of the master, having occasion to have men at work where such appliances are necessary, to use reasonable care to supply suitable tools and appliances. But in the case at bar the plaintiff was a part of a surveying corps. Ladders were furnished by the defendant, for the obvious reason that ladders do not, generally speaking, constitute a part of the equipment of a surveying party engaged in running across country lines. It happened, however, that on the day of the accident a certain building stood in the way; that it became necessary to get upon the top of the building to make angularizations, and that one of the party, who is alleged to have been the defendant's superintendent, finding a ladder against the building, suggested or ordered that the man with others who had preceded him, should climb the ladder and carry up the surveying implements. The plaintiff, an appliance weighing about thirty-five pounds, attempted to climb the ladder, and when a portion of the way up one of the rungs of the ladder gave way, and when he grabbed the second rung to save himself, this likewise gave way and plaintiff fell to the ground, sustaining injuries.

Of course, at common law there could be no recovery if the master did not furnish the ladder and owed no duty to furnish a ladder, and the alleged direction of the so-called superintendent would be merely the negligence or the entire judgment of a fellow-servant. Under the Employment Act it is necessary to show that the ways, works, machinery connected with or used in the business of the employer were defective, or that the accident was produced by

"the negligence of any person in the service of the employer entrusted with and exercising superintendence which the principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as super-

App. Div.] Second Department, March, 1912.

intendent with the authority or consent of such employer." (Laws of 1902, chap. 600, § 1; now Labor Law [Consol. Laws, chap. 31; Laws of 1909, chap. 36], § 200, as amd. by Laws of 1910, chap. 352.) Obviously this ladder was not furnished by the master, but presumptively by the owners of the building, upon private property, where it was found and made use of, just in the sense that a fence, or a platform, or an elevation of ground or any other physical condition come upon in the course of the survey would have been used. Being a common-law appliance, and being one of the hundreds of physical conditions encountered in the survey, the defendant could not be said to use it in its business, and the contention upon this point is absurd.

There is no allegation in the complaint bringing the case within the language of the statute, in so far as it relates to the alleged negligence of the superintendent. The allegation of the complaint is not that the accident was due to the negligence of a "person in the service of the employer, entrusted with and exercising superintendence whose sole or principal duty is that of superintendence," or that such superintendent being absent, it was through the negligence of "any person acting as superintendent with the authority or consent of such employer." It is merely alleged that "through the negligence of the defendant and its servants exercising superintendence or acting as superintendent" the plaintiff was injured. There is no allegation that the alleged superintendent was "entrusted with" superintendence, or that this "sole or principal duty" was that of superintendence, and the evidence does not supply this defect. The case is, therefore, not within the act which is invoked to aid the plaintiff to recover, and it was error to submit the case to the jury.

This conclusion makes it unnecessary to consider the alleged error in the charge of the court.

The judgment and order appealed from should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., BURR, THOMAS and CARR, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

EUGENE A. PARSONS and THOMAS D. KELLY, Copartners, Doing Business under the Firm Name and Style of PARSONS & KELLY, and NEW ROCHELLE COAL AND LUMBER COMPANY, Respondents, *v.* HUGH G. CURRAN and Others, Defendants, Impleaded with PATRICK BARTNETT and PETER E. BARTNETT, Copartners, Doing Business under the Firm Name and Style of BARTNETT BROTHERS, Appellants.

Second Department, March 1, 1912.

Mechanic's lien — assignment of lien — priority.

The assignment of a mechanic's lien by a contractor in payment of a *bona fide* indebtedness is valid and has priority over liens subsequently filed by sub-contractors.

A mechanic's lienor acquires no greater equities than those acquired by any general creditor of his debtor.

APPEAL by the defendants, Patrick Bartnett and another, copartners, etc., from so much of a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Westchester on the 13th day of March, 1911, upon the decision of the court, rendered after a trial at the Westchester Special Term, as adjudges that the plaintiff New Rochelle Coal and Lumber Company is entitled to be paid no sum of money out of the recovery against the defendant Hugh G. Curran before the appellants are paid.

Edward W. Davidson, for the appellants.

J. Addison Young, for the respondents.

HIRSCHBERG, J.:

This appeal presents the question for determination whether the assignment of a mechanic's lien by a contractor to a creditor for a valuable consideration, viz., in payment of a *bona fide* indebtedness, is valid against sub-contractors filing mechanics' liens against the same premises after the making and filing of the said assignment. The facts are not in dispute. On August 28, 1908, the plaintiffs, the members of the firm of Parsons & Kelly, duly filed a notice of mechanic's lien against the premises in question. On September 1, 1908, by an instrument in writing under seal, they assigned said lien to the plaintiff New

App. Div.] Second Department, March, 1912.

Rochelle Coal and Lumber Company in payment of an indebtedness of \$1,760 for materials used upon the premises in question and in payment of an indebtedness of \$1,456.65 for materials used on other premises. This assignment was filed in the office of the clerk of the county of Westchester on the 14th day of September, 1908. On the 7th day of July, 1909, the appellants, the members of the firm of Bartnett Bros., filed a notice of mechanic's lien against the premises in question. From so much of the judgment herein as determines that the said assignment to the New Rochelle Coal and Lumber Company has priority over their lien the defendants Bartnett Bros. appeal.

The learned counsel for the appellants asks for a reversal on the authority of the cases of *Kane Co. v. Kinney* (174 N. Y. 69) and *Crane Co. v. Pneumatic Signal Co.* (94 App. Div. 53; affd. on opinion below, *sub nom. Crane Co. v. Smythe*, 182 N. Y. 545). The *Kane* case was an action to determine the question of priority between a general assignee for the benefit of creditors of a contractor on the one hand, and certain mechanic's lienors on the other. There the plaintiff's lien was filed a few minutes before the filing of the general assignment, but the court assumed for all the purposes of the case that the assignment was prior in point of time, and held that the subsequent lienors acquired a prior right to the fund in question. The learned judge who wrote for the court was careful to state that the case did not present an instance where the assignment had been made upon a valuable consideration. He said (p. 75): "We are not now dealing with a case where the fund has been assigned for a valuable consideration, or with a case where a vigilant creditor has secured in some way a specific lien upon the fund prior to the time of filing the plaintiff's notice of lien. We are dealing with a case of an assignee for the benefit of creditors who stands in the place of his assignor, with no other or greater rights and who takes the property subject to every equity and claim that might have been asserted by third parties; and it seems to me that upon principle and authority it should be held that the assignee's title to the fund in question was subject to liens filed by laborers, mechanics, materialmen or sub-contractors subsequent to the assignment but within the ninety days prescribed by statute."

Second Department, March, 1912.

In the *Crane Co. Case* (*supra*) the struggle for priority was between a trustee in voluntary bankruptcy proceedings and mechanic's lienors who had filed their notices of liens subsequent to the trustee's designation. The court applied the doctrine of the *Kane Case* (*supra*) and held that no material distinction existed for the purpose of the question involved between the rights of a general assignee for the benefit of creditors and the trustee for the estate of a voluntary bankrupt.

We do not think that these cases are decisive of the question herein presented. Here the fund has been assigned for a valuable consideration to an individual creditor who filed the assignment nearly ten months before the filing of the appellants' notice of lien. This case would seem to come within the cases stated by Judge O'BRIEN not to have been dealt with by the Court of Appeals in the *Kane* case. It has long been the rule that a mechanic's lienor acquired no greater eq^{ui}ties than those acquired by any general creditor of his debtor. (*Payne v. Wilson*, 74 N. Y. 348; *Lauer v. Dunn*, 115 id. 405; *v. Herrman*, 117 id. 297; *Stevens v. Ogden*, 130 id. 182; *Salt Springs Nat. Bank*, 157 id. 322.) We do not think the Court of Appeals, in the *Kane* and *Crane Co.* cases, intended to declare the rule established by the foregoing cases applicable to facts such as are presented by the case at bar. There is nothing in the facts of the *Kane* or *Crane Co.* cases necessitating the overthrow of the doctrine that an individual who gives value for the services of a general contractor has a prior claim to subdivide the fund as between the mechanics' lienors of the same fund. In *Behrer v. McMillan* (191 N. Y. 450, 454; affd., *sub nom. Behrer v. City & Suburban Homes Co.*, 191 N. Y. 530) the rule of the *Kane* case was applied to the precise facts of that case. Until the Court of Appeals declares the principle of the *Kane* case applicable to facts such as those presented in the case at bar, we should apply the rule established by the cases already cited regarding the reciprocal rights of assignees of general contractors and mechanics' lienors.

The judgment, in so far as appealed from, should, therefore, be affirmed.

JENKS, P. J., THOMAS, CARR and RICH, JJ., concurred.

Judgment, in so far as appealed from, affirmed, with

App. Div.]Second Department, March, 1912.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
THE LONG ISLAND RAILROAD COMPANY, Appellant.**

Second Department, March 21, 1912.

**Railroad — failure to remove inflammable material from right of way —
Forest, Fish and Game Law, section 228 — damages — amount of
damages.**

Action against a railroad company to recover the penalty prescribed by section 228 of the Forest, Fish and Game Law requiring railroads twice a year to remove inflammable materials from such portions of their rights of way as pass through forest lands or lands subject to fire. The statute provides that the offender shall be liable to a penalty of \$100 for each day that it continues a violation thereof, but fails to state at what times of the year the inflammable material shall be removed.

Held, that although the defendant did not remove inflammable material at all for two years, the maximum penalty recoverable is \$200 and that a verdict for \$32,200 should be reduced to said sum.

HIRSCHBERG, J., dissented.

APPEAL by the defendant, The Long Island Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Suffolk on the 7th day of January, 1911, upon the verdict of a jury rendered by direction of the court, as amended by an order entered in said clerk's office on the 11th day of January, 1911, and also from an order entered on the 3d day of January, 1911, denying the defendant's motion for a new trial made upon the minutes.

Joseph F. Keany, Timothy M. Griffing and James W. Treadwell, for the appellant.

Charles M. Stafford, for the respondent.

THOMAS, J.:

The appeal involves a recovery of penalties in the sum of \$32,200 for violations of the Forest, Fish and Game Law (Laws of 1900, chap. 20, as amd. by Laws of 1904, chap. 590, § 5 [now Laws of 1909, chap. 24, § 72], as amd. by Laws of 1910, chap. 476), whereof section 228 provides: "Every railroad company shall on such part of its road as passes through forest

Second Department, March, 1912.

or lands subject to fires from any cause, cut and remove
s right of way along such lands at least twice a year,
ss, brush and other inflammable materials. * * *
lroad company failing or neglecting to comply with any
rovisions of this section * * * shall be liable to a
of one hundred dollars for each day that it continues
tion thereof." The complaint alleges that defendant's
"at all the times hereinafter mentioned passed,
n forest lands and lands subject to fires, between the
known as Syosset and Wading River. * * * That

each of the years 1904, 1905, 1906 and 1907

s upon said right of way of defendant, along

nd lands subject to fires, grass, brush and o

materials, together with accumulations th

cumulated in preceding years," which the

nd neglected during each of said years and

ncement of this action in 1907, to cut and re

y remove from its said right of way along

nd lands subject to fires," and that by rea

ns the defendant became and is liable to a

r each day for two years immediately pre

ncement of this action, amounting to \$15-

was for \$100 for each day from July 30, 190

that year, and \$100 a day from July 16,

of that year, the plaintiff waiving recover

es and precluded by the Statute of Limita

ing earlier penalties. The evidence is not retu

a statement that there was evidence to the ef

l the times mentioned in the complaint herei

weeds, dead and dry brush, grass, weeds, lea

flamable material grew and were and remain

nt of way of defendant described in said compla

no time from January 1, 1904, to July 29, 19

re, was the said grass, brush or other inflammab

er cut or removed from said right of way, but r

were suffered to accumulate and be and continu

ght of way during all that period; * * *

times hereinbefore stated, said part of defandan

d right of way ran entirely through forest lan

App. Div.]

Second Department, March, 1912.

lands subject to fires from any cause. * * * Defendant, on its behalf, introduced evidence tending to controvert the evidence thus adduced by plaintiffs; but for the purposes of this appeal only the defendant waives any point as to the weight of evidence." So it appears that if the statute is applicable, and so it has been decided herein (194 N. Y. 130), and is valid, as we conclude that it is, the plaintiff made proof that from January 1, 1904, to the commencement of this action on July 29, 1907, the defendant had violated the act. The court, among other things, submitted in its general charge the question of the neglect or failure to cut and remove the material, and also submitted certain special questions relating to the period of the year when the two cuttings were required by the statute in 1905 and 1906, and whether there was such cutting, and the verdict is based on such general and special findings. The jury found that in 1905 and 1906 the statute required cutting from the first to the fifteenth of July, and again from the first to the fifteenth of October, the court charging that the time of the first cutting could not be found to be prior to July first. The appellant urges that the penalty is by the statute limited to \$100, but this does not accord with the ruling in *Jones v. Rochester Gas & Electric Co.* (168 N. Y. 65); *Jones v. Rochester Gas & Electric Co.*, No. 2 (7 App. Div. 474; affd. on opinion below in 158 N. Y. 678), while *Griffin v. Interurban Street R. Co.* (179 N. Y. 438; 180 id. 538) does not impair their force or applicability. The statute states plainly that the offender "shall be liable to a penalty of one hundred dollars for each day that it continues a violation thereof." But the first serious question is whether the statute is so uncertain in its provisions as to preclude the cumulative penalties, and if so, whether its failure to fix definite periods for its observance may be supplied by the findings of a jury. The statute requires that the material be cut twice each year. The jury has interpolated in the statute a mandate that the defendant should have cut first within two dates fifteen days apart, and again between October first and fifteenth, and these dates must be read into the statute, and, for the purposes of this action, made a part thereof. I will not discuss the variability of a statute that is in this way dependent upon the

Second Department, March, 1912.

[Vol. 149.]

consideration of changing juries acting upon differing states of fact. It intimates shifting statutory requirements permissive of grave injustice. It may be that the facts proven would be such as to show a non-compliance utterly irreconcilable with the purpose of the statute. But the statement of the evidence used on the trial of this action discloses the absence of essential facts. There is proof of the forbidden material, and failure to cut and remove it. But there is no evidence that the time to cut and remove it was limited in the first cutting to July fifteenth and in the second cutting to October fifteenth. Why not July sixteenth or seventeenth or eighteenth, or some later date, or October sixteenth, seventeenth or eighteenth, or some later date? It is true that there was evidence that such kind of material had been there uncut, unremoved and accumulating since 1904, but the recovery was not predicated on such earlier and continued neglect, but rather on a failure to act within two periods of some fifteen days each. It is assumed that the parties intended to make concessions broad enough to inform this court of the compass of the evidence, of what had been proven, and yet no facts relating to vegetable growth and the removal thereof for the purpose of guarding against dissemination, increase and decay, and ultimate danger of fire therefrom, are shown to have been presented to the minds of the jurors. Thus the jurors were left, so far as appears, to consider the defendant's statutory obligation from such personal knowledge as they had, and the statute amplified accordingly. It would be hazardous enough to leave the uncertainties of the statute to such varying definitions as jurors might furnish, but the peril to justice from such practice is increased when it appears that the jurors were enforced to rely upon their experience and information, if, indeed, they were at all informed on the subject. If proof amendatory of the statute may be tolerated, and that is not at present decided, it must be so strong and clear as to reveal definitely the unexpressed intention of the Legislature. The evidence shows that the defendant did not cut at all. It should have cut twice. The maximum penalties would be \$200, and the judgment and order should be reversed and a new trial granted, costs to abide the event, unless the plaintiff within twenty days stipulate to reduce the recovery to \$200, in

App. Div.] Second Department, March, 1912.

which case the judgment, as modified, and order should be affirmed, without costs.

CARR, J., concurred; HIRSCHBERG, J., voted to affirm.

BURR, J.:

I agree with my brother THOMAS that the judgment in favor of plaintiff cannot be sustained. While I concur in his opinion as to the sufficiency of the evidence in this case, I consider that the provisions of the statute forming the basis of defendant's liability are so vague and indefinite as to preclude under any circumstances enforcing such liability to a greater amount than the sum of \$100 for each calendar year. A penal statute is to be strictly construed. In my opinion this is a penal statute. The line of distinction between statutes which are to be strictly construed because penal, and those which are to be liberally construed because remedial, is not always easy of determination and definition. The Legislature has not, by express words contained in this statute, attempted to define the character thereof. It has been said that "The legal distinction between remedial and penal statutes is this: that the former give relief to the parties grieved, the latter impose penalties upon offenses committed." (Endl. Interp. Stat. § 333.) "Penal statutes are those by which punishments are imposed for transgressions of the law." (Suth. Stat. Const. § 208.) "The true test in determining whether a statute is penal is whether the penalty is imposed for the punishment of a wrong to the public, or for the redress of an injury to the individual." (36 Cyc. 1181, 1182; *Bay City & E. Sag. R. R. Co. v. Austin*, 21 Mich. 390, 411.) Thus tested, it seems clear that the portion of the statute here under consideration is penal in its character. It is true that it has been held that the provisions of the statute here considered are not limited to cases where a railroad is constructed through the forest preserve, or lands owned by the State. (*People v. Long Island R. R. Co.*, 194 N. Y. 130.) The effect of the statute may be indirectly to benefit any owner of forest lands through which a railroad is constructed, for the reason that compliance there-

with may lessen the danger of destructive fires. But its purpose is not to afford him any redress, nor does the enforcement of it necessarily accomplish this result. It may be, if the penalty is not too severe, that a railroad company will prefer to pay the penalty for a violation of its provisions rather than incur the expense of a compliance therewith. In that event the individual would not even receive a benefit by way of prevention of injury, still less statutory redress for injury if a fire did occur. Again, the penalty is precisely the same whether or not actual injury to the individual has followed a disobedience of the mandates of the statute; and even if the statute might be competent evidence of negligence in an action to recover for injuries suffered by a violation thereof, so far as the penalties provided therein are concerned, it would still be penal in character. (*Bay City & E. Sag. R. R. Co. v. Austin*, *supra*.) The rule that a penal statute must be strictly construed, and when its provisions are within the discretion of the lawgiver it will not be presumed that he intended that it should extend further than the actual expressions contained therein, applies equally to those portions thereof which define the wrong and to those portions thereof which prescribe the extent of the punishment therefor.

The duty imposed by this statute upon defendant is to cut and remove, twice in each calendar year, all grass, brush and other inflammable materials from its right of way. The Legislature having failed to specify at what period in the year the cutting should be done, it may be that to comply with the obligations thereof it would be sufficient if defendant cut twice during any portion of the year. If that is so, a second cutting made upon the last day of the year would be sufficient to absolve defendant from any penalty for the violation of its provisions. As the language specifying the amount of the penalty is to the effect that any railroad company failing or neglecting to comply with the provisions thereof "shall be liable to a penalty of one hundred dollars for each day that it continues a violation thereof," it follows that the amount of the penalty is measured by the days that elapse during which the default continues. As there can be no completed default until the last day of the calendar year, it follows that there

App. Div.] Second Department, March, 1912.

can be no continued default before that time, and at the most there can be but a single day during which such default can be said to continue.

This construction of the statute is in harmony with the principle contained in the later decisions of the Court of Appeals with reference to cumulative penalties. (*Griffin v. Interurban Street R. Co.*, 179 N. Y. 438; *Cox v. Paul*, 175 id. 328; *United States Condensed Milk Co. v. Smith*, 116 App. Div. 15; affd., 191 N. Y. 536; *People v. Spencer*, 201 id. 105.) It may be urged that these cases are not strictly applicable for the reason that this statute does not attempt to provide for cumulative penalties, but for a single penalty, the amount of which is determined by the number of days contained within each year beyond a specified date. The principle, however, is analogous, and the difficulty with this statute is that it contains no specified date. The Legislature have failed to designate any particular time for the performance of the duty the omission to perform which marks the beginning of the period of default, and there is no clear and definite provision fixing the amount of such penalty, or enabling any other person so to do, or enabling a railroad company to determine when it becomes liable for a violation thereof. The general provisions of the act would seem to indicate an intent to fix a single specified penalty. By section 186 of the Forest, Fish and Game Law (Gen. Laws, chap. 31; Laws of 1900, chap. 20) it is provided that in case of recovery of any amount in an action for a *penalty* under said act, the People shall recover full costs. For the disposition of the moneys recovered in said action, it is provided that moneys recovered in an action for a *penalty* shall be paid to the Commission. (§ 187, as amd. by Laws of 1904, chap. 592, and Laws of 1905, chap. 285.) In the section referring to the beginning of such actions for a violation of the fish and game provisions thereof by private persons, it is provided that such person, "except the owner or lessee of the premises upon which a *penalty* is incurred" (which exception was omitted in 1907), may, on certain conditions, recover "any *penalty* imposed by this act." (§ 188, as amd. by Laws of 1905, chap. 285, and Laws of 1907, chap. 96.) The language of the very section under consideration with reference to the

Second Department, March, 1912.

[Vol. 149.]

liability of an officer or employee of a railroad company is to the effect that any such person violating any provision of said section (§ 228, as amd. by Laws of 1904, chap. 590) shall be liable to a penalty of \$100 for every such violation. This must be construed as limiting such liability to a single penalty. (*Griffin v. Interurban Street R. Co., supra*; 180 N. Y. 538; *Cox v. Paul, supra*.) In the *Griffin Case* (180 N. Y. 538) it was held that the word "every" is not necessarily the synonym of "each." The trial court treated the statute as imposing a yearly obligation, and instructed the jury that it could find no verdict against defendant for a penalty for an offense committed in 1905 beyond the thirty-first day of December in that year, and prescribed a similar rule for the year 1906. This must be accepted, therefore, as the law of this case, so far as the amount of the recovery is concerned.

I recommend that the judgment and order denying the motion for a new trial be reversed and a new trial granted, costs to abide the event, unless plaintiff stipulate to reduce the amount of the recovery to the sum of \$200, in which event said judgment and order should be affirmed, without costs.

JENKS, P. J., concurred; HIRCHBERG, J., voted to

Judgment and order reversed and new trial granted to abide the event, unless plaintiff within twenty days to reduce the recovery to the sum of \$200, in which judgment, as modified, and the order are affirmed. Costs.

HELEN CONNOLY, Plaintiff, v. FRIEDRICH J. W.
Defendant.

Second Department, March 8, 1912.

Negligence — injury to pedestrian by fall on icy sidewalk — abutting owner to comply with municipal ordinance.

The owner of lands abutting on a city street is not liable for injuries sustained by a pedestrian who fell upon accumulated ice although he was sweeping newly-fallen snow from the pavement as required by the

App. Div.] Second Department, March, 1912.

ordinance, he did not strew the sidewalk with ashes or similar material which was also required by the ordinance. The owner of real property is not liable for injury to a pedestrian sustained through a failure to comply with the requirements of a municipal ordinance.

MOTION by the plaintiff, Helen Connolly, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon the dismissal of the complaint by direction of the court on the opening upon a trial at the Kings County Trial Term in April, 1909.

Elmer S. White, for the plaintiff.

Carl Schurz Petrasch, for the defendant.

RICH, J.:

This is an action to recover damages for a personal injury occasioned in consequence of the plaintiff's fall upon an icy sidewalk. The action is brought against the owner of the property, who is also alleged to be the plaintiff's landlord. The complaint alleges the ownership, that an ordinance of the city of New York required that "Every owner, lessee, tenant, occupant or other person having charge of any building or lot of ground in the city, abutting upon any street, avenue or public place where the sidewalk is paved, shall, within four hours after the snow ceases to fall, or after the deposit of any dirt or other material upon said sidewalk, remove the snow and ice, dirt or other material from the sidewalk and gutter, the time between nine P. M. and seven A. M. not being included in the above period of four hours," and that "in case the snow and ice on the sidewalk shall be frozen so hard that it cannot be removed, without injury to the pavement, the owner, lessee, tenant, occupant or other person having charge of any building or lot of ground as aforesaid, shall, within the time specified in the last preceding section, cause the sidewalk abutting on the said premises to be strewed with ashes, sand, sawdust or some similar suitable material, and shall, as soon thereafter as the weather shall permit, thoroughly clean said sidewalk;" that the defendant violated the provisions of this ordinance by failing and neglecting to remove snow, ice, dirt and materials from the sidewalk

Second Department, March, 1912.

Second Department, March, 1912.

premises and neglected to cause such sidewalk with ashes, sand, sawdust or other similar suit and "failed and neglected to perform any of the d" upon him by said ordinance, and "negligently and wrongfully undertook to regulate, alter, prove said dangerous condition of said sidewalk whereby the condition of said sidewalk became dangerous, in that they removed the loose snow ing the hard slippery ice exposed, uncovered by dust, sand or other similar suitable material," but January 2, 1904, the plaintiff, while passing using due care, fell thereon, "solely by reason negligence, recklessness and wrongfu nt," and received the injuries for which in this action.

the case to the jury counsel for the
snow, which fell on the morning of Jan
a protection of pedestrians against th
usted there of this packed down ice.
ny question whether he was under any d
ne that the janitor went out and took th
oment he went out and took that snow o
without any sand, salt, sawdust or ashes o
ment the landlord became responsible wit
condition of this sidewalk." The learned
pleadings and opening of counsel dismissed
re the plaintiff an exception and ordered
the first instance at the Appellate Division.
nt and opening state a cause of action ag
based solely upon his violation of the muni
, in having permitted snow and ice to acc
k, and, second, in having swept off the ne
erefrom without causing the accumulated
to be covered with sand, sawdust or other

It is well settled that the owner of real property for an injury to a pedestrian sustained throughly with the requirements of a municipal corporation v. *Gadsden*, 93 N. Y. 12; *City of Rochester* v. *id.* 405.) The cases relied upon by the plainti

App. Div.] Second Department, March, 1912.

of *Rohling v. Eich* (23 App. Div. 179) and *Tremblay v. Harmony Mills* (171 N. Y. 598) are not authorities sustaining his contention. In the former case the abutting owner swept snow from his lot upon the sidewalk, where he permitted it to remain, forming an obstruction which imperiled the safety of persons lawfully using the public street, and in the latter case the property owner maintained a leader from the roof of its building which discharged water upon the sidewalk, where it froze, rendering the walk dangerous and unsafe. The principle of these cases is that a property owner whose affirmative wrongful act is the occasion of injury to a pedestrian lawfully using the walk may be held liable in damages. In the case at bar there was no such negligence. The negligence which is sought to be made the basis of his liability, viz., the sweeping of the newly-fallen snow from the walk, was a lawful act and one required by the ordinance of the city. Neither the complaint nor opening discloses any facts creating a cause of action against the defendant, and the learned justice presiding at the trial properly dismissed the complaint.

Plaintiff's exception is overruled, the motion for a new trial denied, with costs, and judgment ordered for the defendant on the nonsuit.

JENKS, P. J., HIRSCHBERG, THOMAS and CARR, JJ., concurred.

Plaintiff's exception overruled, motion for new trial denied, with costs, and judgment ordered for defendant on the nonsuit.

FLORENCE HASSE, Respondent, *v.* ANTHONY HASSE, Appellant.

Second Department, March 8, 1912.

Husband and wife — action for separation — failure to pay costs in former action — stay of proceedings on counterclaim.

Where a husband was defeated in an action for absolute divorce and has failed to pay a judgment for costs, the wife in a subsequent action for separation is entitled to an order staying her husband's counterclaim for an absolute divorce upon the ground of the adultery charged in the former action until he pays the costs in said action.

The husband's counterclaim only should be stayed, for he is entitled to defend the wife's action.

Second Department, March, 1912.

[Vol. 149.]

APPEAL by the defendant, Anthony Hasse, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 10th day of October, 1911.

Emanuel Klein, for the appellant.

Leopold Blumberg [David Senft] with him on the brief, for the respondent.

RICH, J.:

In November, 1910, the defendant commenced an action against this plaintiff for an absolute divorce, upon the ground of adultery. The complaint in that action was subsequently dismissed and a judgment entered in favor of defendant for costs, which has never been paid. In September, 1911, this action was commenced for a limited divorce, the complaint alleging cruel and inhuman treatment and abandonment. The defendant answered denying all allegations of cruel or inhuman treatment and abandonment, and then, by way of counterclaim, alleges adultery by the plaintiff, and demands an absolute divorce. The adulteries alleged in this answer are the same charged in the complaint in the former action. The plaintiff has procured an order staying the defendant from prosecuting his alleged counterclaim until payment of the costs of the former actions and the various motions. This appeal is from such order.

The appellant contends that the respondent, having him into court, cannot prevent his defending the action, availing himself of every defense that he may have. This is undoubtedly true, but the difficulty with defendant's position is that he was not content to defend, but demands affirmative relief, based upon the subject-matter involved in the action. He denies all of the allegations of plaintiff's complaint. This is his defense, and the order does not undertake to limit his defense to the truth of these denials. If, as he contends, plaintiff's adultery is a complete defense to the cause of action, he should have been satisfied to plead it as a defense and to aver it as a counterclaim upon which he demands affirmative relief. Any action the defendant might have brought against his wife, containing the same allegations as pleaded in the

App. Div.] Second Department, March, 1912.

counterclaim, and demanding the same relief, would have been stayed until payment of the costs of the former action, and that is precisely the result of his present pleading. He cannot be permitted to accomplish indirectly that which he cannot accomplish directly. He may defend this action but he cannot have the affirmative relief of a judgment of absolute divorce because of the adulteries charged in the former action.

The order must be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., HIRSCHBERG, BURR and WOODWARD, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of the Petition of HUGH A. DANIEL to Review the Proceedings of the Congressional Committee of the Twenty-sixth Congressional District of the State of New York, etc.

Second Department, March 18, 1912.

Elections — organization of political convention — Election Law, section 112, not retroactive — vote by proxy.

Section 112 of the Election Law, relating to the organization of political conventions, has no application to the meetings and procedure of a party committee, appointed before the statute was enacted, which has assembled to designate persons to be voted for at primaries.

Where the rules of such committee, appointed before the statute was enacted, permit members to vote by proxy, they may do so, and designations made on votes so cast are valid.

APPEAL by the petitioner, Hugh A. Daniel, from an order of the Supreme Court, made at Special Term and entered in the office of the clerk of the county of Orange on the 11th day of March, 1912.

Graham Witschief, for the appellant.

William F. Cassedy, for the respondent.

RICH, J.:

This proceeding was instituted to review the proceedings of the Republican congressional committee of the twenty-sixth

Second Department, March, 1912.

[Vol. 149.]

congressional district in designating persons to be voted for as delegates to the Republican National convention. It appears that the congressional committee whose proceeding is attacked was appointed prior to the enactment of chapter 891 of the Laws of 1911; and under section 55 of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as added by Laws of 1911, chap. 891) this committee continues an existing committee with the power and right to make designations. Section 55 was amended after the enactment of the statute by providing that where there was no such committee for a district in and for which designations were to be made "a committee designation may be made as shall have been provided by the State committee of the party, by resolution, of which a certified copy shall be filed in the office of the Secretary of State." (Election Law, § 55, as amd. by Laws of 1912, chap. 4.)

A resolution was adopted by the Republican State committee before these designations were made, and a certified copy of the same was duly filed in the office of the Secretary of State, providing that "The Committees of the party for designation purposes for the spring primary of 1912 shall be constituted as follows: Congressional Committees for the 25th, 26th * * * Districts, inclusive * * * the Congressional District Committee already chosen resident in those Districts."

It seems that the existing congressional committee of the twenty-sixth district was composed of Joseph M. Dickey, William B. Royce, Frank A. Hotchkiss, George Esselstyn and Emerson W. Addis, and that a meeting of this committee was called for March 4, 1912, for the purpose of designating candidates, and was attended by Mr. Dickey, the chairman of the committee, in person. Each of the other members of the committee was represented by a proxy duly executed and filed, conferring the power to act. The committee organized and united in the designations which are sought to be nullified in this proceeding.

The learned court at the Special Term has held that the proceedings of the committee are valid, and from the order accordingly entered this appeal is taken.

It is contended that the meetings and the procedure of the party committees assembled to designate persons to be voted

App. Div.] Second Department, March, 1912.

for at the primaries are governed by the provisions of section 112 of the Election Law, as renumbered from section 67 and amended by chapter 891 of the Laws of 1911. That section is included in an article entitled "Conventions," and its language is limited to such a body.

The term "convention" as used in the statute is defined to be "an assemblage of delegates elected in accordance with the provisions of this chapter representing a political party, duly convened for the purpose of nominating candidates for public office, electing delegates to other conventions, electing officers for party organizations, or for the transaction of any other business relating to the affairs or conduct of the party." (Election Law, § 3, as renumbered from § 2, and amd. by Laws of 1911, chap. 891.)

It is plain, I think, that this language has no application to the meeting of a party committee appointed before the statute was enacted. Nor can the contention that but one member of the regular committee was present at its meeting be given the effect contended for. Section 38 of the Election Law, as added by the statute of 1911, provides for the adoption of rules and regulations for the conduct of the official primaries. It says that "Until the adoption of such rules and regulations, the rules and regulations of the existing committee, so far as consistent with this chapter, shall continue to be the rules and regulations of the party for that political subdivision."

As I have said, it appears that the congressional committee was appointed prior to the enactment of the statute, and it appears that no new committee has yet been elected (consequently no committee has yet come into existence upon whom the duty of adopting rules has devolved); that such committee had continued to act, and would so act until their successors were elected at the primaries to be held March 26, 1912; that such committee had a rule operative and in force at the time of their meeting, by the provisions of which proxies of its members were valid. The persons acting as such proxies, therefore, were entitled to vote, and their acts and votes were of the same force and effect in all things as though they were the acts of the duly-appointed members of the committee.

It follows, therefore, that the order must be affirmed, without costs.

JENKS, P. J., THOMAS and CARR, JJ., concurred; WOODWARD, J., concurred in separate opinion.

WOODWARD, J. (concurring):

There is no question that the congressional committee for the twenty-sixth congressional district was chosen prior to the enactment of chapter 891 of the Laws of 1911. Section 55 of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as added by Laws of 1911, chap. 891, and amd. by Laws of 1912, chap. 4) provides that "Party committees now existing shall continue until their successors are elected as provided for in this act, and shall have the power to make designations for the spring primaries in the year nineteen hundred and twelve; but if there be no such committee for a district in and for which designation of candidates for public office and party positions for such primary may be made a committee designation may be made as shall have been provided by the State committee of the party, by resolution, of which a certified copy shall be filed in the office of the Secretary of State." There is no suggestion that the congressional committee did not exist in the twenty-sixth congressional district, and it appears that the Republican State committee likewise designated the then existing committee to act in reference to the spring primaries, so that there was complete authority in the committee continued in office until the election of its successor under the provisions of the statute. This does not appear to be seriously questioned, but the objection raised is that with the chairman of the committee present and acting, the other four members were not present in person, but were represented by proxies, and the contention is that these proxies did not constitute the committee, and that the action of the so-called committee was void. The learned court at Special Term has refused to accept this view, and the question presented upon appeal is one of power in the committee of the twenty-sixth congressional district, as constituted on the 4th day of March, 1912, to make the designations which such committee, as made up of its individual members, concededly had the right to do.

App. Div.] Second Department, March, 1912.

There is no question that in the long-established usage of the Republican party, both in the twenty-sixth district and throughout the State, members of political committees have been in the habit of acting through so-called proxies in the discharge of all of their functions whenever the original members found it inconvenient to be present, and this custom has extended to the power to substitute delegates in the place of those originally elected, where alternates have not been provided. It is contended, however, that under the provisions of chapter 891 of the Laws of 1911, no provision being made for proxies, it was the intention of the Legislature that in the performance of the duties of a nominating committee, the congressional or other committee should act only through its regularly elected members, on the theory that this involves the exercise of personal judgment and discretion, and that such powers cannot be delegated. This contention would be entirely sound if we were dealing with the affairs of a public or private corporation; no one would suggest, in the absence of special statutory authority, that a director of a corporation could delegate his powers to a proxy, for the simple reason that, as a director, his acts bind the corporation—he is acting as an agent of the stockholders, and they have intrusted him with the power to determine questions of policy for them and he cannot delegate this power to some one else, for it does not belong to him to delegate but to exercise. A proxy is defined by Webster to be “the agency for another who acts through the agent; authority to act for another, especially to vote in a legislative or corporate capacity,” and this is the only proper use of the word “proxy;” it is an agency, and where the proxy is duly constituted, and there is no limitation upon his power, a vote by such proxy binds the owner of the stock or other matter acted upon to the same extent as if cast by the latter personally. (23 Am. & Eng. Ency. of Law [2d ed.], 298.)

But the case is entirely different in dealing with the affairs of a voluntary organization, even though its proceedings are regulated by statute. A party committee, like other committees, is “an individual or a body to whom others have committed or delegated a particular duty, or who have taken on themselves to perform it in the expectation of their act being

Second Department, March, 1912.

formed by the body they profess to represent or act for." (Am. & Eng. Ency. of Law [2d ed.], 230.) No one is bound by the act of a committee; it depends for its authority wholly upon the ratification or adoption of the body for which it has acted, that is exactly what is provided for in the statute here under consideration. The committee makes nominations, not for offices, but for persons to be placed upon the party's primary ballot to be nominated for office. If the party or any considerable number of its members is not satisfied with the work of the committee, it has the fullest possible authority to refuse ratification; it can, through a method pointed out by law, other persons upon the party ballot, and the members of the party are left entirely free to reject or to ratify the work of the committee. Not even the individual member of the party, who has named a so-called proxy or substitute, can bind the action of such proxy; he may himself circulate and place a contesting delegation in nomination of such delegation, so that we have none of the elements of morality in these so-called proxies. Having no element of morality, but rather those of a committee, there is no element of morals or of public policy involved in the power of a so-called proxy in a political committee; he is present at the election for one who has no power to bind those who have no power to act, and what he does is of no consequence, except as it is accepted and acted upon by those who selected the committee. Of course, under the new Election Law the party committees do insure the printing of tickets with the names of the persons selected by such committees, but this is incidental, and the persons making up the party have an opportunity if they elect to reject the work of the committee to insist for the insertion of other names upon the ballot. There being no sound legal reason why a member of a committee might not substitute a person to act for him, such substitution being recognized and sanctioned by the law by the very committee which was authorized by the law to continue in existence for the purpose of performing a regular committee duty, I am clearly of the opinion that the court has not erred in refusing to interfere with the action of the committee in the twenty-sixth congressional district.

App. Div.] Second Department, March, 1912.

one member of the committee had a right to make a substitution then each and every one of the members had such a right, and the four substitutes who acted with the chairman on the occasion of the meeting of the congressional committee had as full power to act, under the law, as any other committee. No member of the committee, as originally constituted, has made any objection, so far as appears from this record; no suggestion is made that the committee was not properly convened, nor that any effort was made to do anything without the full knowledge of the members of the committee, and as no action which the committee, as made up of the substitutes, has taken has been challenged by the committee as a whole, or as individuals, and as no one could be bound by any action which the committee could or did take, except in the mere matter of printing and distribution of the ballots, which was equally open to those who opposed the result, it is difficult to discover what authority this court would have to interfere. The remedy of persons dissatisfied with the action of the committee was not to inquire into the make-up of the committee, acting in due form, but to reject the work of the committee and place a rival ticket in the field. Of course, if there was fraud involved, if the meeting had been contrived to prevent the original members of the committee acting personally, a different question would be presented, but here there is no one urging any such question. It is apparently conceded that all the parties acted in good faith, in harmony with established usage, and that each of the four substitutes was there to do what the principal would have done under the same circumstances. At least there is no suggestion that the result would have been different if the original members of the committee had been there in person, and the only result of granting the relief sought by the petitioner would be to deprive the voters within the Republican party in the twenty-sixth congressional district of an opportunity of determining whether or not they will support the nominees of this committee. I do not think this court would be justified in interfering with the action of the committee. I find nothing in the Election Law which gives support to a contrary view.

Order affirmed, without costs.

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App. Div.] Second Department, March, 1912.

paid, on May 20, 1904, when the policy was delivered, that the policy took effect as of that date, and held good for one year from that date, and sixty days thereafter. The evidence is that what was contracted for was delivered, and that if Kilborn made the representations charged, he had no authority to do so, which the application and policy fully stated, whereby the assured and his wife, the beneficiary, knew the fact. And yet, with this knowledge and with the company's later notice that the next premium would become due on February 26, 1905, the assured and the plaintiff, living in Brooklyn, took no measures to reform the instrument. The assured, a traveling salesman, made, on February 26, 1904, the application through Fear, his friend and defendant's soliciting agent located at St. Louis but temporarily in New York, whereby he stipulated, among other things: (1) "That no statements, promises or information made or given by, or to, the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the Company or in any manner affect its rights, unless such statements, promises or information be reduced to writing, and presented to the officers of the Company, at the Home Office, in this application. * * * 3. That the insurance hereby applied for shall not take effect unless the policy is delivered to me during my lifetime and good health, and that, unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application." The policy is dated February 26, 1904, and if the fine print used for the above stipulation in the application may be criticised, the fault does not extend to the policy, which boldly states the agreement that the policy takes effect "as of the Twenty-sixth day of February, Nineteen Hundred and four," and that the sum paid constitutes "payment for the period terminating on the Twenty-sixth day of February, Nineteen Hundred and five, and in further consideration of the payment of a like sum on said date, and thereafter on the Twenty-sixth day of February in every year during the continuance of this Policy, until premiums shall have been paid for Twenty years in all from the date on which this Policy takes effect." Now, who made this found agreement obliterated?

Second Department, March, 1912.

[Vol. 149.]

ating these stipulations in the application and policy, and substituting "May 20th" whenever the date "February 26th" appears as above? The persons were the plaintiff, sent by the assured to pay the premium and to receive the policy, and Kilborn, who was a clerk in the medical department and whose duty it was to arrange appointments for medical examiners to examine applicants for insurance. Kilborn had no other duty relating to defendant's business. Fear was obliged to return to St. Louis on February twenty-eighth, and asked Kilborn to obtain and to deliver several policies. Nobody applied for the Nicoud policy, and Kilborn made numerous ineffectual efforts to deliver it at Nicoud's place of business. The policy has "General Provisions.—(1) Only the President, a Vice-President, a Secretary, or the Treasurer has power on behalf of the Company to make or modify this or any contract of Insurance or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter made, unless made in writing by one of said officers." And yet Kilborn, a clerk in the medical department, concerting with the assured's wife, sent to receive the policy and pay for it, undid the agreement in writing and made another by parol, and it was done by Kilborn's representation as to the time when the premium was payable. There was no misrepresentation leading to the application. There is no variance from the application in the policy. The contract expressed in the policy is the contract agreed upon. It is defendant's acceptance of Nicoud's offer. It is upset, as found, by two persons, and Kilborn at least had not even the appearance of authority to disturb it. When plaintiff went to the defendant's office she said, as she testifies: "My husband has just taken out a policy, and I came over to get it," and when the policy was produced and identified she said: "I came over to take that, how much is it?" That was her errand and to that her authority was primarily directed. But something more was done because the assured's delay in taking his policy made it necessary that his present state of health must be ascertained in accord with the defendant's rule that there must be a new examination in case of non-delivery of the policy within sixty days of the first medical examination. This proceeding did not

App. Div.] Second Department, March, 1912.

bear a semblance to a new application for a new policy, nor did any person so understand, for the policy prepared and ready for delivery under the application of February twenty-sixth was delivered, and the plaintiff knew so well what it said as to payments that she sought advice about them from Kilborn, as she says, and upon the clerk's alleged statements she relied. And yet the policy in her hands taught her and her husband in plainest terms that what Kilborn said could not be the truth, and that he had no right to say it in derogation of the contract. The contract expressed the full intention of the insurer; it spoke clearly that intention to plaintiff and to her husband; showed each of them what contract the assured had made, and by whom and in what form it could be modified. There was not, then, mutual mistake, nor a modified contract nor a new contract. The premium for 1905 was not paid on February twenty-sixth, or May twentieth, or at any time. The defendant mailed and there was received by plaintiff a notice dated January 28, 1905, that the premium would be due February 26, 1905, and that it must be paid, and that in default of payment on the due day the policy would be forfeited and void except as stated. The plaintiff testified that she sent the notice to Fear, who replied that he would be in New York in February and would talk it over with her, and that Kilborn upon her visiting him told her that the notice was nothing and that she did not have to pay until May. Fear and Kilborn deny such communication, but Fear states that he was in New York in February and twice had conversations with Nicoud about the February payment, and the latter promised to pay it without questioning the accuracy of the date of payment. Again, Kilborn's advice as reported is preferred to the contract. So this contract, not only informing in its language but in fact of the assured's obligation, has suffered elisions and interpolations under the pretense of reforming it, and the decree is based on the representation of a person who in official relation and in the form of his action is absolutely excluded from authority by the very contract which the evidence is used to alter. It is urged for the respondent that the court may not review the evidence, inasmuch as it submitted certain issues to the jury and that the appellant has not moved for a new trial. Under such rule

some of the above references to the evidence would be precluded, but the respondent's discussion of the evidence prompted examination of it. However, the main facts appear in the admitted allegations in the pleadings and the decision and several findings, whereby it should be concluded that Kilborn had no authority to modify the contract.

The judgment should be reversed and a new trial granted, costs to abide the final award of costs.

JENKS, P. J., WOODWARD and RICH, JJ., concurred; BURR, J., not voting.

Judgment reversed and new trial granted, costs to abide the final award of costs.

HUGH O'MALLEY, Appellant, *v.* MORSE DRY DOCK AND REPAIR COMPANY, Respondent.

Second Department, March 1, 1912.

Master and servant — negligence — injury to eyesight by particle of steel — proof not justifying recovery.

Action by a servant against his master to recover damages for personal injuries. The plaintiff was struck in the eye by a flying particle of steel. The injury was alleged to have been caused by the negligence of an incompetent fellow-servant who was engaged in chipping bolts with a chisel. Evidence examined, and held, insufficient to establish either the negligence or incompetency of the plaintiff's fellow-servant, or the negligence of the foreman in appointing him to do the work.

WOODWARD, J., dissented.

APPEAL by the plaintiff, Hugh O'Malley, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 10th day of March, 1911, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case upon a trial at the Kings County Trial Term.

Hector A. Robichon [Edward M. O'Gorman with him on the brief], for the appellant.

M. L. Malevinsky [Amos H. Stephens with him on the brief], for the respondent.

App. Div.] Second Department, March, 1912.

THOMAS, J.:

A particle of steel, the size of which was from a pinhead to a grain of rice, was taken from the plaintiff's right eye, but the sight was destroyed. At an earlier time the sight of the other eye had been destroyed by a piece of flying steel. So the man was blind. The plaintiff charged that the piece that entered his right eye was allowed to do so through the incompetency of a fellow-servant, one Tierney. Plaintiff, an experienced man in defendant's service, while chipping and caulking in the hold of a ship some seven feet below, saw Tierney holding a chisel for clipping bolts in the hatch, and at the instant received a particle of steel in his eye. Tierney manipulated the chisel while one Eggleston, since deceased, was striking it. The latter was skillful; the absence of his working companion made a substitution necessary, and he asked the foreman for Tierney, saying: "He is better than half the riveters around here; give me him." So he was assigned. The foreman had not given him such work before, but had seen him riveting. This shows that Tierney's fellow-servant, himself capable, regarded Tierney as competent to hold and adjust the chisel while he used the hammer, and the foreman was justified in relying upon the information and approbation. The foreman did not indicate whether Tierney should strike or hold, but assigned him to drive rivets. The evidence shows that the men come to the duty of clipping by stages, doing a little work here and there as opportunity offers, and so due skill is obtained. The record is very scant in its history of Tierney's work at driving. He testified that he "drove rivets all day, down there, * * * a week or so before the accident." He was hired as a heater boy, and was not a riveter. He says: "I take every chance I can, every bit of driving. I followed it up to a certain extent." A witness for plaintiff testified that Tierney's work was heating rivets, and spoke of his energy in availing himself of a chance to rivet; that he could chip and drive, although he never saw him chip, while one Duffy stated that Tierney was not competent to chip rivets. He was at the time about twenty and a half years of age and had been with the defendant several years. The plaintiff testified that the skilled riveter

holding the chisel in one hand and a hammer in the other, which seems to have been the manner of working, would so deftly intercept the clippings with his hammer as to prevent a chip of the least size from flying; but his witnesses, while commending the general efficacy of the intercepting hammer, concede the inability of the skilled holder of the chisel to prevent the escape of some chippings. From the evidence it appears that no skill would prevent so small a particle flying from the chisel, however skillful the handling of the hammer. The plaintiff also claimed, and aided the contention with the evidence, that the chisel could be so held as to turn the chippings or shavings in whatever direction the operator would, and consequently away from neighboring workmen. This statement within limits seems reasonable, as does that of another witness, that the blow must be adapted to the condition of the chip as the work progresses. But Eggleston was striking the blow, and so far as appears the fault may have been with him, if there was fault. But in view of the evidence that the operator with the chisel and hammer may not always prevent the escape of flying pieces of steel, the flying of a particle like that of a grain of rice would not indicate negligence or incompetency. In any case, the foreman could not be deemed guilty of negligence in allowing Eggleston to use Tierney as his coworker, because it does not appear that the escape of so small a particle was due to any incompetency of Tierney. The trial justice also considered that there was not sufficient evidence that the particle came from the rivet on which Tierney was working. There are two items of evidence to consider in this regard, (1) the plaintiff's evidence, (2) the opportunity for it to come from another source. Plaintiff testified that the chip hit him as he was looking up at Tierney, who was about seven feet above him; that it came from a heated rivet. But he later stated that he did not see it start or on its course, but followed this by saying that he saw from where it started, but not on the way; but his evidence shows that he was not giving minute attention to the riveters, and the statement that he saw where the particle came from must be taken as an inference on his part that it did come from the place, because he felt it as he was looking and because, in his judgment, there

App. Div.] Second Department, March, 1912.

was no one so placed as to cause it to go in his direction, as others were outside the hatch.

I am not satisfied that the evidence does not indicate sufficiently that the particle came from the Eggleston-Tierney work, even though the plaintiff did not see it start, inasmuch as the evidence tends to negative the probability of an origin elsewhere. But upon the ground that the escape of the particle indicates neither negligence nor incompetence on the part of Tierney, and that the foreman used reasonable care in designating him to the work upon the request and recommendation of Eggleston, I conclude that the judgment should be affirmed, with costs.

JENKS, P. J., BURR and CARR, JJ., concurred; WOODWARD, J., dissented.

Judgment affirmed, with costs.

SIEGMUND NATHAN, Respondent, *v.* WILLIAM H. WOOLVERTON, as President of the NEW YORK TRANSFER COMPANY, Appellant.

Second Department, March 8, 1912.

Pleading—amendment of complaint on contract to allege conversion—Statute of Limitations—amendment denied.

The plaintiff in an action against a common carrier for breach of contract seeking to recover the value of jewelry which was removed from his trunk while in the possession of the defendant, and who has failed to recover on the ground that he misled the defendant as to the contents of the trunk, and paid only the rate for the carriage of ordinary baggage, should not, after the Statute of Limitations has run, be allowed to amend his complaint so as to seek a recovery for conversion.

JENKS, P. J., and WOODWARD, J., dissented.

APPEAL by the defendant, William H. Woolverton, as president, etc., from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 5th day of December, 1911, granting the plaintiff leave to serve an amended complaint.

Robert L. Redfield, for the appellant.

Robert L. Turk, for the respondent.

THOMAS, J.:

The appeal is from an order allowing amendment to the complaint. The complaint in this action, begun on November 3, 1905, alleges that for a reasonable compensation defendant received and agreed to carry plaintiff's trunk between two points in the city of New York, and that the trunk was broken open and a quantity of jewelry and valuable stones taken therefrom.

The answer, after some denials, stated separate defenses, and thereby the issue was raised that the defendant, having as a special carrier contracted to carry the personal baggage of the passenger from a railroad train, received a trunk containing merchandise and jewelry, the nature and value of which were concealed from the carrier, whereby it was committed to the carriage of articles for the ordinary compensation of carrying baggage.

A verdict was had by the plaintiff, whereupon a new trial was granted by Mr. Justice JAYCOX, with an opinion (69 Misc. Rep. 425), whereon the order was affirmed by this court (147 App. Div. 908). The essential thing decided is stated by the learned trial justice as follows: "So far as the jewelry in the trunk was concerned there was no contract as to it, and the defendant had no knowledge that it was in its possession. This being so, I am of the opinion that plaintiff had no cause for action."

The trial court refused to charge the jury that a verdict could be predicated upon the larceny of the contents of the trunk by defendant's servants on the ground that the *action* was not for a conversion. The trial was had in May, 1910; the order setting aside the verdict was entered on October 17, 1910; notice of appeal was filed October twentieth; the decision of this court was rendered on November 17, 1911, and a motion to amend the complaint was made on or about November 21, 1911.

The amended complaint, allowed on payment of full costs, seems to state a cause of action based on an agreement to carry safely, and another for conversion of the trunk and its contents by the defendant, his agents and servants. The order was entered December 5, 1911, at which time the

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costs,
to carry
contents
banded
cause

App. Div.] Second Department; March, 1912.

of action for conversion was barred by the Statute of Limitations. The defendant appellant appeals from this order chiefly upon the ground that the plaintiff was enabled thereby to set up a new and distinct cause of action after decision against him on the underlying contract for carriage, and after such laches that the Statute of Limitations had run against the new cause of action.

The plaintiff misled willfully or negligently the defendant to accept as his baggage a trunk containing valuable merchandise in the form of jewelry, etc., and knowingly made compensation therefor at a rate reasonable for the carriage of usual personal baggage. In view of this, and the ruling respecting it, the action was not maintainable. Hence the plaintiff would interpolate a cause of action for conversion, and it is not amiss to notice that there is no statement in his moving papers of facts that tend to justify his delayed accusation. He has or has not the evidence of it. If he has it, he should have stated the facts. But his attorney alone makes the affidavit, and he is silent on that subject. What then is his project for proving the conversion? Is it not to show the demand and non-delivery? Thereby he proves a bailment for hire and non-delivery on demand. This would throw on defendant the burden of showing loss under conditions consistent with due care. (*Clafin v. Meyer*, 75 N. Y. 260.) In substance, what he has unsuccessfully attempted under a plea of contract, he would attempt under a plea of conversion. But the essential consideration is that it has been established that his misconduct vitiated his alleged contract. But it was by this same misconduct that he induced the defendant to receive his baggage, misleading him to inadequate handling, guarding and policing merchandise of such value. Considering himself hopelessly defeated in maintaining the integrity of his contract, and having waited until his cause of action for tort was barred by the Statute of Limitations, he now seeks to use this action for enforcing a barred cause of action. The contract and bailment arise from the same facts, and the plaintiff's misconduct induced both.

It is not necessary to determine whether it is within the power of the court to allow the amendment, inasmuch as the impropriety of the allowing of it is evident by reason of the

plaintiff's initial breach of duty. Moreover, while plaintiff has been exploiting one cause of action that revealed his misconduct, the Statute of Limitations has barred an action for conversion, which he would give life by tacking it to an action on contract. Thus are raised issues that require the examination of facts and circumstances now more than six years away in time, and the procurement of witnesses perchance scattered or unobtainable, and the embarrassment to defendant is caused by the plaintiff's electing his form of action and pursuing it.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

BURR and CARR, JJ., concurred; JENKS, P. J., and WOODWARD, J., voted to affirm on the opinion of Mr. Justice KAPPER at Special Term.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LILLIAN RYAN, Appellant, *v.* THE SUPERINTENDENT OF THE STATE REFORMATORY FOR WOMEN AT BEDFORD, N. Y., Respondent.

Second Department, March 1, 1912.

Court—jurisdiction—trial of offender on Sunday—Magistrate's Court, city of New York.

A magistrate of the city of New York has no power to try and sentence on Sunday a woman who has pleaded not guilty to a charge of soliciting for purposes of prostitution.

The provisions of the city charter relating to the attendance of magistrates in court on Sunday do not authorize the trial on that day of an offender who pleads not guilty, that being forbidden by section 5 of the Judiciary Law.

REARGUMENT of an appeal by the relator, Lillian Ryan, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 17th day of October, 1911, dismissing a writ of habeas corpus.

A reargument was ordered "on the validity of the proceedings held on Sunday." (148 App. Div. 928.)

App. Div.] Second Department, March, 1912.

W. A. Fischer, for the appellant.

Robert C. Taylor, Assistant District Attorney [Charles S. Whitman, District Attorney, with him on the brief], for the respondent.

THOMAS, J.:

The relator was tried on Sunday for soliciting in a public place for the purpose of prostitution, and was sentenced to the New York State Reformatory for Women at Bedford. Upon a plea of guilty taken on Sunday a woman was forthwith sentenced and committed to such reformatory, and the same was upheld in *People ex rel. Price v. Warden, etc.* (73 App. Div. 174). But in that case there was judgment upon plea on arraignment, while in the present instance a trial of an issue raised by a plea of not guilty was had. It is the general policy of the State that courts shall be closed on Sunday, while power to act on that day for certain purposes is continued. Such policy is declared in section 5 of the Judiciary Law (Consol. Laws, chap. 30; Laws of 1909, chap. 35), which re-enacted section 6 of the Code of Civil Procedure: "A court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury. * * * But this section does not prevent the exercise of the jurisdiction of a magistrate, where it is necessary to preserve the peace, or, in a criminal case, to arrest, commit or discharge a person charged with an offense."

Chapter 601 of the Laws of 1895, whereby was created Magistrates' Courts and the Court of Special Sessions, by section 5 authorized the board of city magistrates to adopt rules "as to the hours at which said courts shall be opened on each day, including Sundays and legal holidays, and what officers shall be in attendance," and this power was continued by the charter of the city of New York (Laws of 1897, chap. 378, § 1892), and by section 1398 thereof it was provided: "A city magistrate shall be in constant attendance in each of the city magistrate's courts between the hours of nine o'clock in the morning and four o'clock in the afternoon on every day except Sundays and legal holidays, but including election day," etc.

In 1901 such charter was amended (Laws of 1901, chap. 466,

Second Department, March, 1912.

[Vol. 149.]

§ 1397) so as to direct in terms that the board of magistrates should adopt, and from time to time amend such rules "as to the hours at which said courts shall be open each day, including Sundays and legal holidays, and what officers shall be in attendance," and it was further provided (§ 1398): "the several city magistrates' courts shall be opened every day at nine o'clock in the morning," and in certain districts named "shall not be closed before four o'clock in the afternoon, except on Saturdays, Sundays and holidays, when morning sessions only shall be necessary." (See, also, Laws of 1903, chap. 410, amdg. § 1398.)

In 1910 in the Inferior Criminal Court Act (Laws of 1910, chap. 659, § 71) it was provided: "There shall be a city magistrate's court held daily in every court district, * * * each court shall be open every day at nine o'clock in the morning and shall not be closed before four o'clock in the afternoon, and the city magistrate assigned thereto shall be in attendance thereat except during a reasonable recess and except that the afternoon session may be dispensed with upon Saturdays, Sundays and holidays, other than days upon which general elections are held, when each court shall be open until the polls close."

The respondent's contention, in view of such statutes, is that the law contemplates that the court shall be opened for the exercise of its full jurisdiction. It is considered rather that these statutes were to provide for or to insure the opening and holding of the courts and the attendance of the magistrate for the purposes for which its jurisdiction is exercisable in conformity to the general law. If section 6 of the Code of Civil Procedure broadly forbids the exercise of jurisdiction on Sunday, save for the purposes mentioned, and the exceptions do not include the trial of offenders, then the provisions for the opening and holding of magistrates' courts on Sunday intend that they shall be opened for the purposes authorized by law. If a statute provides, as the Code (§ 6) in effect does, that a magistrate's court shall not try a prisoner for a criminal offense on Sunday, but may do other acts, later provisions in statutes that magistrates' courts shall be opened and held on Sunday mean that they shall be open to do the exceptional acts allowed,

App. Div.] Second Department, March, 1912.

and not those forbidden. In other words, the provisions in the charter command the attendance of magistrates to hold court on Sunday and a corresponding opportunity for those concerned, but do not enlarge what may be done. The peace must be preserved on Sunday, and so the magistrate should be on duty. Arrests may be necessary, and those arrested should be forthwith taken before the magistrate, who may commit for trial or, in proper cases, discharge. But that a person, as in the case at bar, may be summarily tried for an offense involving long imprisonment or detention is neither within the words or spirit of the law, and is contrary to policy of the State and the uses to which Sunday is appropriated. The prisoner is entitled to counsel, but lawyers are resting from professional duty; witnesses are entitled to the quiet of the day, and are enjoying immunity from ordinary obligations; opportunities for the preparation of the case and the conduct of it are wanting or impaired. Above all, it is a day of rest so far as the safety and necessities of the people permit. When the State intends that prisoners shall be tried on Sunday, it will state its policy in language other than that of ordering the attendance of magistrates for the exceptional purposes specifically allowed or commanded and the holding of courts therefor.

The relator should be discharged.

JENKS, P. J., BURR, CARR and WOODWARD, JJ., concurred.

Order reversed on reargument, with ten dollars costs and disbursements, and relator discharged.

MARY E. SHAVER, Appellant, *v.* NEW YORK LIFE INSURANCE COMPANY, Respondent.

Second Department, March 8, 1912.

Appeal — dismissal of complaint — failure to except — master and servant — negligence — injury from melted sealing wax — defective receptacle — question for jury.

Where, after a disagreement of the jury, a defendant delayed applying for a dismissal of the complaint and an order of dismissal was made nearly fifty days after trial, the Appellate Division will review the facts

Second Department, March, 1912.

[Vol. 149.]

on an appeal by the plaintiff from a judgment entered on an order of dismissal, although there is no exception to the order.

Action by a servant against a master to recover for injuries received owing to the fact that a cup holding melted sealing wax overturned and burned her. Evidence examined, and *held*, that the question as to whether the cup furnished by the master was defective was for the jury.

APPEAL by the plaintiff, Mary E. Shafer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 28th day of June, 1911, upon a dismissal of the complaint by direction of the court after the jury had failed to agree upon a verdict, and also from an order entered in said clerk's office on the 3d day of July, 1911, dismissing the complaint herein.

Thomas J. Ritch, Jr., for the appellant.

Carl Schurz Petrasch [Sidney L. Teven with him on the brief], for the respondent.

THOMAS, J.:

Plaintiff, for many years employed as a general utility girl by defendant, was directed to do what she had often done, seal packages with wax taken by her from a small pan or cup set down about a quarter of an inch into a receiving standard. While she was scraping, gently as she says, the melted wax from the applying stick on the edge of the cup, it upset and severely burned her. The jury disagreed and later the defendant, although it had not so moved at the close of the evidence, "applied" for a dismissal of the complaint, and it was so ordered, and the plaintiff has appealed from the order and judgment thereon. The record shows no exception, but order of dismissal was made on June 29, 1911, although the trial was on May eleventh. It would be injustice to deny a review of the facts by reason of the failure to file an exception to an order so made. The cup and holder were bought in the open market, and were of a kind in general use. Such utensils are "generally made in two parts," as defendant's expert stated. From this evidence it is inferable that they are sometimes made in one part, although defendant's superintendent of the printing department stated that all were separable; that the

App. Div.] Second Department, March, 1912.

cup was brass or copper, and the base iron, suggesting an impossible unity, and that their separability was for the purpose of readily cleaning them. If this evidence be accepted, the disposition of the case was correct, even though, as the witness Roden said, a cup did at one time tip with her and she reported it. But there is evidence for the plaintiff that the cup produced by defendant on the trial was not the cup she was using, in that the absent one had a deeper flange, which in itself is not sufficient to disturb the judgment, and that the two parts of all cups were originally united so as to form one piece. This evidence as to the union is given by the forewoman in the printing department until within six months of the accident. She was not permitted to give evidence of repairs, which was error, as it may be that it would have shown that the parts were refastened after the separation of them indicated by her. The plaintiff, as she says, did not know that the parts were separable, and perchance they were not. It may be argued that the evidence preponderatingly shows that the utensil used and all utensils used were in two parts; but, whatever the view may be in that regard, the question was in the first instance for the jury whether the dish was one of parts originally fastened so that the cup could not tip, and whether through the defendant's negligence there had been failure to preserve the dish in its intended condition. If the repairs had upon it related to this, evidence of the same was admissible, otherwise not.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., HIRSCHBERG, CARR and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

Second Department, March, 1912.[Vol. 149.]

HENRY J. WASHBURN, Respondent, *v.* JOHN T. RAINIER and PAUL N. LINEBERGER, Appellants, Impleaded with THE RAINIER COMPANY and VIOLA C. RAINIER, Defendants.

Second Department, March 15, 1912.

Debtor and creditor — transfer of assets by debtor and assumption of debts by assignee — election — assertion of claim against assignee — when directors of corporation making transfer not liable to creditor.

A judgment creditor having filed a proof of claim against a bankrupt corporation which had assumed the debts of his original debtor, another corporation, cannot subsequently bring an action against the directors of the original debtor on the theory that they had no right to sell its assets to the company which assumed the debt. This, because the directors were not parties to the contract, but merely trustees for their corporation, and were not the plaintiff's original debtors, and also because the plaintiff by filing the claim in the bankruptcy proceedings affirmed the validity of the transfer.

APPEAL by the defendants, John T. Rainier and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Nassau on the 19th day of June, 1911, upon the decision of the court rendered after a trial at the Kings County Special Term.

Don R. Almy, for the appellants.

F. W. Sparks [*Roy C. Gasser with him on the brief*], for the respondent.

THOMAS, J.:

The plaintiff having a judgment against the Rainier Company, on April 7, 1909, filed a proof of claim based thereon against the Rainier Motor Car Company in bankruptcy. Why a judgment against the first company should or could be filed against the second company is explained by the statement in the proof of claim, "that the consideration of said debt is as follows: Amount of a judgment secured by said Washburn against The Rainier Company [describing the judgment] under an agreement between said bankrupt and The Rainier Company, the predecessor of the said bankrupt, said bankrupt assumed and agreed to pay all the debts of The Rainier Com-

App. Div.]

Second Department, March, 1912.

pany, of which this is one." In the present action the plaintiff has recovered a judgment against the appellants for breach of duty, in that they participated in making the contract upon which the proof of claim is based, by which contract the Rainier Motor Car Company sold and delivered its capital stock to or in behalf of the Rainier Company, and assumed its debts, specifically the plaintiff's claim, and in consideration thereof took over all of the property of the Rainier Company. That is, the appellants, directors of one company, made a contract for it, whereby another company took its property and assumed its debts, and a creditor of the first company took judicial proceedings to collect his debt from the second company, in reliance upon the contract, and, pending the same, recovered damages against the directors for wrongfully making the contract without his consent. The contract was deemed rightful to justify the creditor using it to get his debt, and yet as made without authority for the purpose of recovering damages against the trustees who made it. The question is not one of novation or concurrent remedies against the companies. If the plaintiff, as it is forcibly argued, may under the doctrine presented in *Lawrence v. Fox* (20 N. Y. 268) recover the debt from either or both companies (*Zeiser v. Cohn*, 144 App. Div. 825), yet why may he do so against the vendee, the Rainier Motor Car Company, if not by virtue of the very contract whereof he, in this action, accuses the appellants of breach of duty? If there are two debtors, the contract that adds the second one must be valid. But if it is valid, it is because the creditor so affirms of it. If those who made it did so in contravention of the creditor's rights under *Darcy v. Brooklyn & N. Y. Ferry Co.* (196 N. Y. 99), yet the creditor, of whom they were not regardful, appropriates it, that he may use the debtor, it creates and its property, for the collection of his debt. Hence the creditor is not estopped as to the appellants because he does or may pursue the vendor, original debtor, and the vendee, the assuming debtor, but because if he pursue the vendee he affirms the action of the agents who established the very right and relation of which he makes use.

There is much discussion of novation, which negatives the
APP. DIV.—VOL. CXLIX. 51

Second Department, March, 1912.

[Vol. 149.]

primary liability and regards an obligation **lifted from one** person and placed upon another by the concurrence of the two and the creditor. But it is quite unimportant **here whether** there has been such novation. That would involve the construction of the agreement as between the parties **to it** and the creditor's acts respecting it. The appellants are **not parties to** the contract. They were not the plaintiff's debtors originally nor under the contract. They are merely trustees, who for their corporation made and executed a contract, and who are accused of having done so without the plaintiff's consent. And yet the plaintiff has made himself a party to the proceedings in bankruptcy of a corporation that could only be his debtor by virtue of the contract; he has solemnly sworn in that proceeding that the Rainier Motor Car Company is "justly and truly indebted" to him for the judgment under this very **agreement**; that such company is the successor of the other, and thereby he seeks to appropriate the assets of the bankrupt **corporation** to his debt. But now, for the purposes of this action, he denies the appellants' authority to make the contract or any ratification of their action. What they did he appropriates; in that they did it, he takes measures to thrive by it; in that they should not have done it, he recovers for their unauthorized doing of it. He would recover at once for what is and what should not have been, on a contract existing and because it should not exist, for acts done without the agency and as if within the agency. Whatever of power of control a tenant in bankruptcy may in theory have, the plaintiff has ever may be reaped from participation in a judicial proceeding the plaintiff is seeking and may obtain; and the plaintiff for himself this status after full knowledge of what he has done, and of how far the appellants had exceeded their authority. Such action by the plaintiff was an affirmation of the validity of the contract, an announcement of its adoption by him, an election to rely on it to gain some of the benefits it promised. The plaintiff may not do this and yet recover upon the ground that it should not have been made. There is an election of remedies, and thereby an approval of the action of those who furnished the right to follow the debtor and its property. The plaintiff cannot be heard to declare his non-assent

App. Div.] Second Department, March, 1912.

he seizes the benefit, to assert a fraudulent claim while he takes what he may of its product. The authorities are many, and it is necessary to instance few of them particularly pertinent to the present facts. A person informed of facts that would authorize the rescission of a contract may not file a claim in bankruptcy in affirmation of it, and later rescind it. (*Matter of Kenyon*, 156 Fed. Rep. 863.) He cannot become a party to a proceeding in bankruptcy by proving his debt and later reclaim the subject of his debt which is a part of the estate. (*Standard Varnish Works v. Haydock*, 143 Fed. Rep. 318; *Ormsby v. Dearborn*, 116 Mass. 386; *Seavey v. Potter*, 121 id. 297; *Moller v. Tuska*, 87 N. Y. 166.)

The same rule prevails when a creditor by his act ratifies an assignment for the benefit of creditors. (*Sweetser v. Davis*, 26 App. Div. 398; *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466.) These decisions are that a creditor may not by legal proceedings affirm one relation to his debtor, or the latter's action or property, and later recall it and substitute another relation. If a trustee in contravention of his trust dispose of his trust property, the beneficiary can elect to regard the act done for or against his advantage, but he cannot assert both. He may gain the proceeds of the unauthorized act, but that forecloses subsequent disclaiming of interest in it. (*Hine v. Hine*, 118 App. Div. 585; *Washburn v. Benedict*, 46 id. 484.)

The assets of the Rainier Motor Company did constitute a trust fund for the payment of the plaintiff's debt, and the transfer of them was illegal as to the plaintiff in the absence of his consent. (*Darcy v. Brooklyn & N. Y. Ferry Co.*, *supra*.) But the *res*, that should have been reserved in the title of the debtor, was transferred to another upon a promise that it would pay the plaintiff; the plaintiff pursued the vendee in legal proceedings and sought to recover his share of the *res*, not because he was following it as fraudulently transferred, but rather as rightfully transferred, basing his right to share in it upon the promise of the second company to pay him. There was the consent. There was the approval of the act of the trustees, and an acceptance of its benefit, which precludes the present accusation of wrong. (*Terry v. Munger*, 121 N. Y. 161.) The usual rule is that an action against a person

Second Department, March, 1912.

[Vol. 149.]

for a breach of trust is barred by the beneficiary's acquiescence in the unauthorized act (*Sherman v. Parish*, 53 N. Y. 483, 492), and that a *cestui que trust* may not allege that an act is a breach of trust done under his sanction, either by previous consent or subsequent ratification. (*Butterfield v. Cowing*, 112 N. Y. 486.)

The judgment should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., CARR, WOODWARD and RICH, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

SARAH J. TRIEBER, as Executrix, etc., of WILLIAM TRIEBER, Deceased, Respondent, *v.* NEW YORK AND QUEENS COUNTY RAILWAY COMPANY, Appellant.

Second Department, March 15, 1912.

Damages — action to recover for death caused by negligence — verdict not excessive — practice — motion to set aside assessment of damages — discretion — appeal — review of discretion — evidence not going to damages — privilege — communications made to physician — waiver.

A verdict of \$15,000 for the death of a man sixty years of age who had been earning \$30 a week as an architectural draftsman and had been doing other business and who left surviving a widow and two grown daughters, one of whom lived with her parents, though large, is not excessive. Where after judgment absolute for the plaintiff has been rendered by the Court of Appeals on the defendant's stipulation and subsequently the damages of the plaintiff have been assessed under section 194 of the Code of Civil Procedure, it is improper for the defendant to move to set aside the verdict on the judge's minutes and for a new trial under section 999 of the Code of Civil Procedure.

It seems, however, that such motion may be treated as one to set aside the inquisition and may be considered by the court in its discretion.

Such motion to set aside the inquisition will not be granted merely for the admission or exclusion of evidence unless it appear that the error defeated the ends of justice.

The discretion of the trial court in granting or denying a motion to set aside such inquisition is reviewable by the Appellate Division, but not by the Court of Appeals.

App. Div.] Second Department, March, 1912.

An order refusing to set aside the inquisition will be affirmed on appeal, where no improper evidence was admitted on the question of damages. The privilege of communications made by a patient to his physician in his professional capacity created by section 884 of the Code of Civil Procedure is not for the benefit of the physician, but for that of the patient, and may be waived by him, or, after his death, by his personal representative.

The error of a trial court in refusing to compel a physician to disclose communications received from a patient is not reversible error, even if there has been an express waiver on behalf of the patient, unless the evidence sought was material to the issues.

On an inquisition to assess damages for a death caused by negligence it is not reversible error for the court to refuse to allow the decedent's physician to be questioned by the defendant as to the decedent's physical condition five or six years before the accident, where the form of the question was not specific enough to indicate that it was sought to show that he was permanently injured in health.

JENKS, P. J., dissented, with opinion.

APPEAL by the defendant, The New York and Queens County Railway Company, from an order of the Supreme Court, made at the Queens County Trial Term and entered in the office of the clerk of the county of Queens on the 15th day of June, 1911, denying the defendant's motion to set aside a verdict of \$15,000 in favor of the plaintiff and for a new trial.

G. B. Hanavan [Bayard H. Ames, Walter Henry Wood and James L. Quackenbush with him on the brief], for the appellant.

Aaron P. Jetmore [Frederick J. Gardenhire with him on the brief], for the respondent.

CARR, J.:

The plaintiff has recovered judgment in the sum of \$15,000 damages and costs, etc., making in all \$18,626.16. The action was brought to recover damages for the death of plaintiff's husband through the negligence of the defendant. On the first trial there was a judgment for the defendant; on appeal to this court this judgment was reversed and a new trial granted (134 App. Div. 661). The defendant gave a stipulation for judgment absolute and appealed to the Court of Appeals, where the judgment of this court was affirmed (201 N. Y. 520). The case then came back to Trial Term for

an assessment of damages under section 194 of the Code of Civil Procedure. The decedent was sixty years of age; he left a widow and two grown-up daughters, one of whom was married, the other living at home with the parents. He was an architectural draftsman, earning \$30 a week from the city of New York and doing a little outside business. According to the plaintiff's proofs he was in ordinary health but slightly lame in the left leg. The defendant attempted to prove that he was in poor health and afflicted or threatened with a paralysis or locomotor ataxia. The jury awarded damages of \$15,000. It was a large verdict and the trial court so thought. It was not so large as to indicate passion or prejudice, and we should not attempt to disturb it on that ground alone. We have sustained verdicts as large under similar circumstances. (*Boyce v. New York City Railway Co.*, 126 App. Div. 248, 253.) The defendant moved to set aside the verdict on the judge's minutes and for a new trial under section 999 of the Code of Civil Procedure. This practice was not proper on an inquisition of damages. (*Bossout v. Rome, W. & O. R. R. Co.*, 131 N. Y. 37.) The court, however, treated the motion as one to set aside the inquisition, and as such one addressed to its discretion and after consideration denied the same. For this practice there is precedent, although the practice under such circumstances is not prescribed expressly by the Code of Civil Procedure. As pointed out in *Bossout v. Rome, W. & O. R. R. Co.* (*supra*), such a motion is addressed to the discretion of the court and is to be determined according to the ends of justice, and it will not be granted as a new trial would be for the mere admission of improper evidence nor merely because competent evidence was excluded. It must appear that the admission or exclusion of such evidence defeated the ends of justice. (*Ward v. Haight*, 3 Johns. Cas. 80; *Sharp v. Dusenbury*, 2 id. 117.) The exercise of discretion by the court in granting or denying the motion to set aside the inquisition is reviewable in this court although not reviewable in the Court of Appeals. (*Bossout v. Rome, W. & O. R. R. Co.*, *supra*; *Bassett v. French*, 155 N. Y. 46; *Lewin v. Lehigh Valley R. R. Co.*, 169 id. 336.) With the record of the inquisition before us we are unable to find that any improper evidence was admitted on the

question of damages. It is claimed, however, that competent and proper evidence offered by the defendant was excluded. Several instances of such exclusion are cited, but only one of them is serious enough for present consideration. The defendant called one Dr. Fitch, who had attended the decedent some five or six years before the accident. He was questioned by the defendant's counsel as follows: "You have testified that in 1902 or 1903 you treated Mr. Trieber; will you state what you treated him for at that time?" The witness refused to answer, claiming that it would be improper to disclose information acquired by him in his professional capacity. The court declined to compel the witness to answer unless there was an express waiver by the plaintiff. While no formal objection was made by the plaintiff, there was at the same time no express waiver made, and the question remained unanswered. It is true that the privilege claimed by the physician did not belong to him but to the patient, and could have been waived by the personal representative, the plaintiff. (Code Civ. Proc. §§ 834, 836.) At the same time, though technically the physician was claiming a right which he did not possess, yet a refusal by the court to compel him to answer would not, even on a trial where there had been an express waiver, be a reversible error unless it appeared that the evidence sought was material to the question to be determined. (*Zimmer v. Third Avenue R. R. Co.*, No. 1, 36 App. Div. 265, 272.) Here the question related to a condition existing some five or six years before the accident. The question was not specific enough to appear material on its face. If it was sought to show that the decedent was then permanently impaired in health, the question should have so indicated. As the question was put, the answer might disclose something of no importance whatever to the question of damages. To say that the failure of the court to compel the witness to answer this question was against the ends of justice on this inquisition of damages would require some speculation as to what the answer would have been, and we are not at liberty to resort to speculation in order to reverse the decision of the court which presided over the inquisition. Moreover, there was here no express waiver. Some colloquy took place between the respective counsel, but it is clear that

the plaintiff and her counsel did not intend to waive the provision of section 834 of the Code of Civil Procedure.

The order must be affirmed, with costs.

BURR, THOMAS and WOODWARD, JJ., concurred; JENKS, P. J., read for reversal.

JENKS, P. J. (dissenting):

I dissent. I think that the learned court fell into reversible error when it dealt with the attempt of the defendant to elicit the testimony of the physician, as detailed in the opinion of my brother CARR. The privilege asserted by the physician was that of his patient (*Johnson v. Johnson*, 14 Wend. 637; *Zimmer v. Third Ave. R. R. Co.*, No. 1, 36 App. Div. 272), and in this case of the representatives of the patient. I think, therefore, that the assertion of privilege should have been made at least ultimately by them (Wigm. Ev. § 2386), and that they should not have been permitted practically to stand at gaze by assertion that they had no privilege. The witness did not refuse to answer as to any specific ailment, but refused to name the ailment that required his professional services, and thereby indicated that his refusal was absolute and general, resting upon the professional privilege itself. I think that in view of this attitude the defendant was not required to go forward to question the witness as to the specific ailment which the defendant had in mind. There is no indication that the disposition of the court of the inquiry could do no harm to the defendant, as was the case in *Roche v. Nason* (185 N. Y. 138) and in *Zimmer v. Third Ave. R. R. Co.*, No. 1 (*supra*). Yet, before we can disregard the rejection of competent evidence, it should appear that such rejection could not have legitimately affected the result. (Baylies N. T. & Ap. 341, 342.) Even if the learned court had pressed the plaintiff to an assertion of the privilege, which had been sustained, it would not have been harmful, for no inference as to the facts thereby excluded could have been legitimately drawn. (Wigm. Ev. *supra*, and cases cited.)

Order affirmed, with costs.

App. Div.] Second Department, March, 1912.

WILBUR E. LUTES, as Administrator, etc., of CALVIN C. LUTES, Deceased, Respondent, *v.* TOWN OF WARWICK, Appellant.

Second Department, March 8, 1912.

Highways — negligence — action for personal injuries — notice to town — failure to state time and place of accident — proof not justifying recovery.

While the statute requiring the plaintiff intending to sue a town for injuries received by reason of a defective highway to serve a verified statement of the causes of action as a condition precedent thereto does not in express terms require the notice to state the time and place of injury, a notice which fails to do so is defective.

Action against a town to recover for the alleged negligence of the highway commissioner in failing to remove bushes or limbs of trees extending into the highway, by reason of which the plaintiff, driving upon the highway was struck in the eye and blinded. Evidence examined, and held, insufficient to justify a recovery.

HIRSCHBERG and THOMAS, JJ., dissented.

APPEAL by the defendant, the Town of Warwick, from a judgment of the Supreme Court in favor of the plaintiff's intestate, entered in the office of the clerk of the county of Orange on the 10th day of May, 1910, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 6th day of October, 1909, denying the defendant's motion for a new trial made upon the minutes.

M. N. Kane, for the appellant.

John C. R. Taylor, for the respondent.

BURR, J.:

Defendant appeals from a judgment recovered by Calvin C. Lutes for personal injuries, and from an order denying a motion for a new trial. After the entry of judgment the said Calvin C. Lutes died intestate, and the action was revived and continued in the name of plaintiff as his administrator. On August 11, 1907, plaintiff's intestate was riding over a road within the boundaries of the town of Warwick, known as the Kimbers Point road. He occupied the left-hand side of the third or rear seat of a canopy-top wagon. In the course of

Second Department, March, 1912.

[Vol. 149.]

the ride something came in contact with his right eye, injuring it to such an extent that he lost the sight thereof. On the twenty-fifth of November in the same year he caused to be served upon the supervisor of the town a verified statement of his claim, in which he fixed the place of the accident at a point about 600 feet westerly from the intersection of said road with a railroad running from Pine Island to Sussex. He therein stated that the injury was due to the fact that he was "struck in the right eye by a large limb or branch of a tree or large bush, which then and there extended for a great distance over the travelled path of said highway." Similar statements were contained in the complaint. Upon the trial it appeared quite satisfactorily that at the point indicated in said notice there were neither branches of trees nor bushes overhanging the highway, so as to be a menace to travelers thereon, and said Lutes thereupon sought by the testimony adduced in his behalf to fix the place of the accident at a point distant nearly a quarter of a mile from the railroad, and near a temporary bridge constructed over a ditch to enable persons to drive from the adjoining fields onto the highway. The service of a proper verified statement of the cause of action is a condition precedent to plaintiff's maintenance thereof. (Highway Law [Gen. Laws, chap. 19; Laws of 1890, chap. 568], § 16; *Reining v. City of Buffalo*, 102 N. Y. 308; *Curry v. City of Buffalo*, 135 id. 366; *Thrall v. Cuba Village*, 88 App. Div. 410.) While the statute does not in express terms require that the time and place of the injury shall be stated in the notice, we think that the plain purpose thereof is not fulfilled in the absence of such statement. (*Purdy v. City of New York*, 193 N. Y. 521; *Quinn v. Town of Sempronius*, 33 App. Div. 70; *Spencer v. Town of Sardinia*, 42 id. 472.) In the *Purdy* case the court say, construing chapter 572 of the Laws of 1886: "The plain purpose of this statute, and of similar provisions in the charters of the various municipalities throughout the State, is to guard them against imposition by requiring notice of the circumstances of an injury upon which a claim for damages is made, so that its authorities ^{may} be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation."

The statute before us, reasonably construed, does not require those things to be stated with literal nicety or exactness, but it does require such a statement as will enable the municipal authorities to locate the place and fix the time of an accident." It is true that the statute then under consideration specifically provided that the time and place at which the injuries were received should be stated. But a pleading would not sufficiently state a cause of action if it omitted to specify, in general terms at least, the time when and the place where the accident occurred. Certainly the purpose of the statute would be defeated if the statement of the cause of action, served upon the supervisor, did attempt to fix the place of the accident, and did it so incorrectly that the town authorities in investigating the facts would be entirely misled as to the liability or non-liability of the town. Respondent contends that the character of the highway for the entire distance between the bridge and the railroad crossing was substantially the same, and that, therefore, no prejudice resulted from the error in the statement. We think that the evidence fails to establish this, and, in addition, that the evidence introduced in behalf of plaintiff's intestate does not fairly justify the conclusion that it was an overhanging branch of a tree which came in contact with his eye. In the first instance he did testify that "A limb of a tree struck, I think, the four posts of the wagon, dodged along from one to the other, and after it was released from the middle post it got to where I was sitting and struck me in the eye with mighty terrific force. It struck me in my right eye. The limb came from the left side of the highway." That it was the overhanging limb of a tree is manifestly his conclusion, for he subsequently says that he did not see it, and that he did not know whether it was the limb of a tree or a part of a bush. "All I know is that I was struck; * * * that something hit me in the eye." His wife, who was in the wagon with him, could not tell whether it was a limb of a tree or a twig from a bush. It seemed to her that it came from above the wagon, but she could not tell. His brother, Phineas, who was also a passenger in the wagon, testified in the first instance that said Lutes was struck "with a bush that scraped along on the top of the wagon, and worked along under the top." He does

Second Department, March, 1912.

[Vol. 149.]

add that he judged that it came from a tree, but he would not say positively whether it did or not. The driver of the wagon, who sat upon the front seat thereof, and who was called as a witness for plaintiff, testified that there were no branches of trees hanging over the highway on the day in question. He said: "I did not see whether any brush or limbs of any kind hanging over the highway that day as I drove through there struck my wagon. I sat in the front seat. I did not hear any complaint of limbs striking the wagon. I heard that something had struck him in the eye." He further said that just before they came to the railroad track he heard someone say, "that a fly did something, had gotten in his eye; struck him in the eye. * * * I heard someone say that a fly had struck him in the eye." Prior to the trial of the action said Lutes caused a deposition of his brother Levi, who was also in the wagon with him, to be taken. At the time of the trial Levi was dead, and this deposition, taken at his instance, was read by defendant. While the witness testified that it was a twig which came in contact with his brother's eye, he also testified with great positiveness that it was a twig from a bush which grew at the side of the road. He further testified that shortly after the accident he returned to the scene thereof and cut off the end of the bush and preserved it to be used as an exhibit in the case. Thereafter witnesses called for the defendant testified that they examined and found the stub from which the twig had been cut. This was part of a bush growing at the side of the road, and was distant 560 feet from the railroad track, or about the distance named by Lutes in his statement of the cause of action which he served upon the supervisor.

The learned trial court charged the jury as follows: "The claim made in behalf of the defense is that if the plaintiff hit by a branch, or a twig, a portion of a branch, he was hit by any overhanging branch from a tree, but that he hit by a twig being a part of a wayside bush which stood some four feet at the butt from the nearest wheel track, traveled roadway there being necessarily narrow, as it had to be between those trees, and which bent out to some extent toward the beaten track so that a carriage driving along the side of it came in contact with it. That is the claim made

App. Div.] Second Department, March, 1912.

behalf of the defense. I instruct you in the line I have said before, if that is the way the accident happened there is no liability here on the part of the defendant."

Without considering all of the evidence offered on the part of the defendant, we think that the evidence offered on the part of the plaintiff and the evidence offered on the part of the defendant above referred to, which was uncontradicted, fails to establish by a fair preponderance thereof that plaintiff's intestate was struck by the branch of a tree overhanging the highway. If that is so, the judgment entered upon the verdict cannot be sustained. Defendant contends that at the time of the happening of the accident there was no statutory obligation upon the commissioner of highways to remove bushes growing upon the sides of the highway, and, therefore, under no circumstances would the town be liable for an injury resulting in consequence thereof. It is not necessary for us to determine this question at the present time. If the town is liable at all, it would only be if negligence of the commissioner of highways in connection with the care thereof was established. The facts and circumstances bearing upon the question of negligence in connection with the presence of bushes at the side of the road was not fully presented upon the trial of this case. Under the ruling of the trial court it became unnecessary for defendant to do this, the question was not submitted to the jury, and they have made no finding thereon.

The judgment and order denying the motion for a new trial must be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., and CARR, J., concurred; HIRSCHBERG and THOMAS, JJ., dissented.

Judgment and order reversed and new trial granted, costs to abide the event.

J. L. EMIL SCHUELER, Appellant, v. MARY LOUISE DOOLEY, Respondent.

Second Department, March 1, 1912.

Real property — vendor and purchaser — agreement to convey free of incumbrances unless vendee elects to assume liens — effect of failure of vendee to state intentions.

Where a vendor of lands agreed to convey by a full covenant deed of warranty free of incumbrances, except that should the vendee on the day of closing title desire to assume any liens, the amount thereof should be deducted from the purchase price, the vendor was entitled to wait until the day of passing title to learn whether the vendee desired to assume existing liens, and where the vendee failed to disclose his intention until that day the vendor was entitled to a reasonable time thereafter in which to remove the incumbrances.

Hence, where neither party claimed default as against the other on the day set for passing title, it is error in an action by the vendee to recover earnest money paid to submit the issue as to whether the vendor was in default.

WOODWARD and RICH, JJ., dissented.

APPEAL by the plaintiff, J. L. Emil Schueler, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Queens on the 8th day of October, 1910, upon the verdict of a jury, and also from an order entered in said clerk's office on the 30th day of September, 1910, denying the plaintiff's motion for a new trial made upon the minutes.

Peter R. Gatens, for the appellant.

Clarence Edwards [Joseph J. Tuohy with him on the brief], for the respondent.

PER CURIAM:

The vendor had agreed to give a full covenant deed of warranty of the premises free from incumbrances, "except that should the party of the second part desire on the day of closing title, to assume any mortgage or mortgages that may be liens on said premises, and taxes or assessments, then, and in that event the amount of said mortgage and taxes together with accrued interest to said date of delivery of deed shall be deducted

App. Div.] Second Department, March, 1912.

from the balance of said purchase price (it being mutually understood and agreed by the parties hereto that all previous contract, writings, agreements and understandings, written or oral are merged in and superseded by this agreement), and which deed shall be delivered on the 28th day of January, 1907, at 1 o'clock P. M., at the office of Joseph J. Tuohy, No. 28 Jackson Avenue, in Long Island City, Queens County, New York, and it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties."

No one claimed at the trial that on the 28th day of January, 1907, the vendor was in a position to give the title which she had contracted to give, that is, free from incumbrances. There was no requirement in the contract that the vendee should give any notice to the vendor as to the mortgages, etc., prior to the day on which the title was to close. Therefore, neither of the parties to the contract was in default on that day, because the courts would read into the contract a provision that the vendor was entitled to wait until the closing day to learn from the vendee whether he would assume the incumbrances, and was likewise entitled to a reasonable time thereafter to remove the incumbrances if the vendee failed to disclose his intentions on that point until the closing day. Neither party claimed as against the other a default on that day. It was error, therefore, for the trial court to submit to the jury as a question of fact to determine whether the plaintiff was in default on January 28, 1907.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., THOMAS and CARR, JJ., concurred; WOODWARD and RICH, JJ., dissented.

Judgment and order reversed and new trial granted, costs to abide the event.

JENNIE BRADY, as Administratrix, etc., of JOHN C. BRADY, Deceased, Appellant, *v.* THE CITY OF NEW YORK and Others, Respondents, Impleaded with EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, Defendant.

GUISSEPPE DiCRESCENTI, as Administrator, etc., of COSIMO DiCRESCENTI, Deceased, Appellant, *v.* THE CITY OF NEW YORK and Others, Respondents, Impleaded with EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, Defendant.

Second Department, March 15, 1912.

Negligence — injury caused by caving in of sewer excavation — evidence — prospective liability of city contractor and gas company.

Separate actions against the city of New York, a municipal contractor engaged in constructing a sewer, and a gas company as codefendants to recover for the death of a child who fell into the sewer excavation when the street caved in subsequent to an explosion, and also to recover for the death of an employee of the contractor working in the excavation at the same time. Evidence examined, and held, that in the action to recover for the death of the child nonsuits as against the contractor and the city should be reversed while a nonsuit as to the gas company should be affirmed;

That in the action to recover for the death of the employee a nonsuit as to the contractor should be reversed while a nonsuit as to the city should be affirmed.

APPEALS by the plaintiff, Jennie Brady, as administratrix, etc., and Guiseppe DiCrescenti, as administrator, etc., in the above-entitled actions, from separate judgments of the Supreme Court in favor of the defendants, one entered in the office of the clerk of the county of Kings on the 5th day of May, 1911, upon the dismissal of the complaint as to the defendants the City of New York and Brooklyn Union Gas Company by direction of the court at the close of plaintiffs' case; the other entered in said clerk's office on the 8th day of May, 1912, upon a dismissal of the complaint as to the defendants Rodgers and Hagerty, and also from orders entered in said clerk's office on the 31st day of August, 1911, denying the plaintiffs' motions for new trials in said actions.

William H. Griffin [Martin T. Manton with him on the brief], for the appellants.

App. Div.]

Second Department, March, 1912.

James D. Bell [*Frank Julian Price* and *Archibald R. Watson* with him on the brief], for the respondent city of New York.

Frank Verner Johnson [*Amos H. Stephens* with him on the brief], for the respondents Rodgers and Hagerty.

THOMAS, J.:

The appellants, dismissed when they rested at the trial severally representatives of two persons killed, one a child playing on the street, and the other a workman in an excavation for a sewer in the street, charged culpable negligence against the city of New York and Rodgers and Hagerty, its contractors to make the sewer, as well as the Brooklyn Union Gas Company, whose pipes were suspended in the excavation, but against whom the appeal unquestionably fails. The excavation in Gold street, in width eighteen feet, occupied most of the roadway, while its depth was from forty-five to forty-seven feet and its length some one hundred and thirty-five feet. Its sides were sheathed and at intervals of five and one-half feet for its entire length cross braces, some ten inches square, rose with intervening spaces nine or ten feet. From beams on the surface of the excavation were suspended the lines of gas pipes and electric wires. As the work advanced the completed portion of the excavation so far as convenient was filled, the beams that interfered with the advancing work were removed, as this enabled a form in use to be pushed forward. At the time of the accident the men had, through a distance of some sixty feet, removed beams two tiers from the bottom of the sewer, when the timbering before or after an explosion fell in, and the land adjacent to the excavation, including portions of the sidewalk, was drawn in for its entire length. The respondents' position, as understood, is that no cause of action in favor of either plaintiff is proved against anybody, inasmuch as the cause of the ruin is not known. The child, whose case is first considered, in rightful use of the street, was killed because the sidewalk on which he stood was drawn into the excavation. Such an engulfment is so abnormal that the persons responsible for the excavation and the appropriation of

Second Department, March, 1912.

[Vol. 149.]

the street therefor should make proof of such care as would meet the presumption of negligence raised by the ruinous invasion of the public way. When sidewalks so disappear, due lateral support against the excavation is obviously absent, and whoever is shown to have been responsible for the work should explain why what the law requires to be done for such support was not afforded. Hence, when the plaintiff Brady showed the happening, the city primarily, and any one co-operating with it in the work, were put to proof. But the plaintiff made more proof, and what more she made as it is claimed by the respondents, leaves the plaintiff's case unproved. So the next inquiry is whether the presumption of negligence is lost by the evidence received. The uncontradicted facts leave the gas company without fault. What, then, of the city and its contractors? The contractors are shown to have shored efficiently the sides of the excavation until the time in question. What, then, caused the fall? It was either the explosion of gas, the removal of too many timbers, or the removal of too many timbers in conjunction with defective timbers left. It was a question of fact whether the cause was explosion or defective operation and material. There is much evidence from which a jury, in case of submission to it, could justly find that the timbers first gave way and carried with them the pipes and electric wires. If the falling of the timbers was the proximate cause, then the evidence of the timbers removed and the weakened condition of some of the timbers left, by reason of holes and rottenness, if such the jury found to be the case, strengthens the presumption of negligence, and even in the absence of such presumption, based upon the rule of *res ipsa loquitur*, would have justified the jury in finding that the persons responsible for the care of the place were negligent. But what if the jury found that the explosion was the proximate cause? Would the rule *res ipsa loquitur* apply so as to require proof of due care to counteract the presumption? Explosion on private property was not deemed *prima facie* evidence of negligence as to persons injured without its limits (*Cosulich v. Standard Oil Co.*, 122 N. Y. 118), and it may be that if gas pipes, as usually laid, exploded, such holding would apply even as to persons injured on the street. But here it is

App. Div.]

Second Department, March, 1912.

shown that the gas pipes were removed from a uniform and solid support in the earth and hung on supports placed at intervals and in proximity to electric wires similarly removed from ground covering and support, and that there was a noise like an explosion, which flames of fire followed. That state of facts would, in absence of explanation, permit the inference that what was imbedded and so protected had been exposed to possible bending or breakage at the joints, or had been uncovered so as to permit gas to leak into the air in case the disturbed pipes were defective, and that, too, in the neighborhood of electric mains. Such facts joined to an explosion would be sufficient evidence of negligence in the case of injury to a person on the street and demand evidence of requisite care on the part of responsible parties. The streets are made for the people, and it would be an intolerable burden, in the case of a sidewalk undermined by explosion of pipes and wires hung on temporary supports, to compel the injured or the survivors of the dead to explain, after examination in the wreck and debris, what the support was and why the maintenance was defective. The actors knew the facts and should give evidence that no fault of their own caused the upheaval. But it is not necessary to state in this case that the mere explosion is sufficient, inasmuch as such explosion in association with such facts as I have detailed, if the jury found them to exist, made such *prima facie* case of negligence as to require proof of due care in the support of the pipes and inspection of their condition. But does the foregoing apply against the city as well as its contractors? It applies to the contractors, for what was done they did, and if the nature of the work required something omitted it was their duty to supply it. The contract between them does not appear, but it is inferable that, as the contractors undertook to do the work, they assumed to do it in a proper way and with proper protections. The work was lawful, it was not inherently dangerous, nor did the injury result essentially from the nature of the work, but from the method of doing it. But the city was not relieved of care that the surface of the street and sidewalks, so far as use of them was permitted, be kept reasonably safe, nor do I consider that the city could entirely shut its eyes to the way the work was carried

Second Department, March, 1912.

[Vol. 149.]

on, but rather that some fair ascertainment and inspection of methods and conditions should accompany the work. This duty, it may be assumed, was done as to the method of shoring adopted, which had to the time proved sufficient. But it could not be fairly expected that the city would watch each detail of the work—for instance, the removal of beams from time to time as the work advanced. There is evidence of defective beams rotten in places, but the proof in that regard is not sufficient to show negligence on the part of the city in inspection. That would require a minute examination of material and operation that would place far too great burden upon a municipality in its relation to an independent contractor in a work like the present one. The city has a duty respecting obstructions in the street, and, as I consider, it cannot excavate or undermine streets or delegate the power to others to do so, regardless of the intrinsic danger or danger arising from the nature of the work, or from the general methods of doing the work, but it is not required to inspect timbers stick by stick, or follow operatives as they erect or remove them, nor, if the general method of supporting gas pipes and wires is not proven negligent, is it obliged primarily to keep up such a system of inspection as would make it liable upon proof of explosion of gas. The contractors are the persons in immediate charge, and the explanation rests upon them to show that they did what requisite prudence required. Therefore, no liability on its part is proven, or evidence thereof adduced in either the Brady or DiCrescenti case. But, in the Brady case, the issue as regards the contractor should have been left to the jury in that (1) the engulfment of the sidewalk under the facts proven raised a presumption of negligence, and this is so whether it was caused initially by the fall of the timbers or the explosion; (2) because the evidence of the removal of the timbers, and the condition of some of those left, was sufficient to require the submission of the contractor's negligence to the jury. This court at this time may not consider the weight of the evidence. Hence, discussion of the credibility of the witnesses for the plaintiff is inopportune. Thus far the question of the submission of the contractor's liability to the jury has related to the case of

App. Div.]

Second Department, March, 1912.

the person on the street. Is the case of the servant different? Should the court charge the jury that the falling in of the excavation raises as to the servant a presumption of negligence? It may be noticed that the servant was not making a safe place less safe, or subjecting it to increased danger, but was, as a concrete man, lining a sewer in a place prepared for him by excavation, and was entitled to have due preparation for his work by the master in the support and inspection of the pipes and the maintenance of the suitable timbers. (*Kranz v. Long Island R. Co.*, 123 N. Y. 1; *Schmit v. Gillen*, 41 App. Div. 302.) But the fall itself did not declare negligence, as it was not a structure like a trestle carrying a permanent tramway, considered in *Ristau v. Coe Co.* (120 App. Div. 478; affd., 193 N. Y. 630). It was not an appliance like a scaffold, the fall of which in itself has long been regarded sufficient evidence of negligence (*Stewart v. Ferguson*, 164 N. Y. 553; *Solarz v. Manhattan R. Co.*, 8 Misc. Rep. 656;* affd., 155 N. Y. 645), even though a plank from it fell upon a servant (*Iesief v. N. Y. C. & H. R. R. Co.*, 102 App. Div. 168); it does not suggest negligence as did the ledge on the edge of a deep place used as a way in a mine and giving way under a servant (*Lentino v. Port Henry Iron Ore Co.*, 71 App. Div. 466) or the falling roof on which servants were privileged to walk. (*Muhlens v. Obermeyer & Liebmann*, 83 id. 88.) The rule of *res ipsa loquitur* was early applied to persons injured in the street from objects falling therein upon travelers, as in *Mullen v. St. John* (57 N. Y. 567), which was followed by *Volkmar v. Manhattan R. Co.* (134 id. 418), and the doctrine was also applied where the injured person was necessarily passive, and the highest practicable care was required of one transporting him, maybe by a highly dangerous agency, as in *Curtis v. Rochester & Syracuse Railroad Co.* (18 N. Y. 534); *Edgerton v. N. Y. & H. R. R. Co.* (39 id. 227); *Seybolt v. N. Y., L. E. & W. R. R. Co.* (95 id. 562, 568). But the spread of the rule was arrested in *Cosulich v. Standard Oil Co. (supra)*, where an explosion of oil on defendant's premises did injury on adjacent premises. Since that time the rule

* See 11 Misc. Rep. 715.—[REP.]

Second Department, March, 1912.

[Vol. 149.]

has been applied to persons standing in other relations, as in the case of the falling of an elevator in a building and injuring passenger. (*Griffen v. Manice*, 166 N. Y. 188.) Yet, save as above noticed, it has been usually denied in cases between master and servant (*Starer v. Stern*, 100 App. Div. 393; *Stackpole v. Wray*, 99 id. 262), where, in each case, a servant was injured by the falling of a freight elevator; in *Rende v. N. Y. & Texas Steamship Co.* (187 N. Y. 382), where an iron shutter fell on one coaling a ship; *Dougherty v. Milliken* (163 id. 527, 532), where an eyebolt breaking let a derrick fall; in *Schlappendorf v. American Railway Traffic Co.* (142 App. Div. 554), where a bucket fell from loosening of clamps that held a cable; in *Lawson v. Merrall* (69 Hun, 278), where a clamp of an elevator broke and fell; in *Dobbins v. Brown* (119 N. Y. 188), where a bucket holding servants fell while descending into a mine; in *May v. Berlin Iron Bridge Co.* (43 App. Div. 569), where roof trusses in the course of construction fell. Other instances could be given where the rule has and has not been applied, but the above indicates that the present happening does not raise the presumption of negligence in the case of the servant. Nor should any attempt be made to state a rule or rules for the application of the doctrine. The spirit of it may be gathered from the opinion in *Griffen v. Manice* (*supra*). In a particular case where the nature of the event would not permit the use of the rule, such event with added facts indicating a cause may justify a presumption of negligence. But in the present case the state of facts which the plaintiffs' evidence tends to prove does not raise the presumption, but does require that there be a submission to the jury to determine (1) whether the timbering left in use to shore the excavation was so weak and defective from holes and decay as to permit the sides to fall after the removal of sufficient shoring to permit the work to progress; (2) if so, whether the contractors were negligent in that regard; (3) whether such neglect was the cause of the injury. But assume that the jury find that the accident arose from explosion from the escape of gas. That fact itself would not be sufficient evidence of negligence. The plaintiff must show neglect of the master whereby gas escaped. Such proof is not in the present record.

App. Div.] Second Department, March, 1912.

The judgments and orders should be reversed as to defendants Rodgers and Hagerty and new trials granted, costs to abide the event, and as to the other respondents affirmed, with costs.

In the first action, judgment entered May 8, 1911, and order denying motion for new trial reversed and new trial granted, costs to abide the event. Judgment entered May 5, 1911, and order denying motion for new trial reversed as to defendant The City of New York, and new trial granted, costs to abide the event, and affirmed as to defendant Brooklyn Union Gas Company, without costs. Memorandum by CARR, J. BURR and WOODWARD, JJ., concurred; THOMAS, J., read for affirmance as to the judgment entered May 5, 1911, and the order denying motion for a new trial, with whom JENKS, P. J., concurred, and for reversal of judgment entered May 8, 1911, with whom JENKS, P. J., BURR, CARR and WOODWARD, JJ., concurred.

In the second action, judgments and order reversed and new trial granted, costs to abide the event, as to the defendants Rodgers and Hagerty, and unanimously affirmed, with costs as to the defendant The City of New York.

The following is the memorandum written in the action of *Brady v. City of New York*:

CARR, J.:

While I concur with THOMAS, J., that the judgment and order should be reversed as to the defendants Rodgers and Hagerty, it seems to me that the judgment and order should be reversed likewise as to the City of New York on the ground that it was a question for the jury whether the City of New York had under the circumstances shown reasonable care and diligence in the maintenance of the street surface during the progress of the sewer construction.

In the Matter of the Application of FRANCIS R. HITCHCOCK, Respondent, in His Own Behalf and That of Others Similarly Situated, for a Writ of Mandamus Directing the Officers of the UNION FERRY COMPANY OF NEW YORK AND BROOKLYN, Appellant, to Permit an Examination of the Corporate Books.

Second Department, March 8, 1912.

Mandamus — return conclusive — corporation — inspection of corporate books — failure to make demand for information before petition.

Where a petition for a peremptory writ of mandamus is met by opposing affidavits of the respondent, the relator, standing upon the pleadings, is in the position of a demurrant who admits the facts alleged by the respondent.

A stockholder is not entitled to a peremptory writ of mandamus compelling his corporation to allow him to examine its books for the purpose of discovering the prices at which the corporation retired outstanding bonds which it purchased in the open market, if no preliminary demand for such information was made upon the corporation but merely a demand for a written statement of its affairs, pursuant to section 69 of the Stock Corporation Law, which latter request was complied with.

APPEAL by the Union Ferry Company of New York and Brooklyn from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 4th day of December, 1911, granting a peremptory writ of mandamus.

George P. Hotaling, for the appellant.

William G. Cooke, for the respondent.

WOODWARD, J.:

The relator has been granted a peremptory writ of mandamus directing the Union Ferry Company to permit him to examine the books of the corporation. The petition of the relator is met by the opposing affidavits of the officers of the corporation, familiar with its affairs, and the relator, standing upon the pleadings, is in the position of a demurrant, admitting all of the facts alleged by the respondent to be true, but

App. Div.] Second Department, March, 1912.

insisting upon his right to relief notwithstanding such facts. (*People ex rel. Lehman v. Consolidated Fire Alarm Co.*, 142 App. Div. 753, 754, and authority there cited.) It appears from the petition that the relator, with others, on the 20th day of December, 1910, demanded in writing a statement of its affairs under the provision of section 69 of the Stock Corporation Law (Consol. Laws, chap. 59; Laws of 1909, chap. 61), and that this request was complied with. Subsequently relator's attorneys wrote a letter to the treasurer of the Union Ferry Company, in which they acknowledge the receipt of the statement, making no question as to its not being under oath, as required by the statute, but declaring that "It is not a statement of the affairs of the Company nor a particular account of its assets and liabilities. What the stockholders want to know is the profit at which the ferries are now running; how much is being now earned; out of what the dividends are paid; what securities, if any, are now owned by the Company, that is, the more particular account of the assets. We presume that the sum you state for real estate, boats, etc., over \$4,000,000 is not the actual valuation."

This appears to be the full extent to which the relator, or any one in his behalf, has made any request to the corporation for information as to the condition of its affairs; there has been absolutely no suggestion that the relator desired to know anything about the retirement of the corporation bonds until the filing of the petition demanding a writ of mandamus. There was no rejection of the financial statement made by the treasurer of the corporation; no objection that it did not conform to the requirements of the law in that there was a failure to verify the same. On the contrary, the report seems to have been retained by the relator and others, by their attorneys, and the defect in this regard must be deemed to have been waived. The statute provides that this statement, when made, shall be open to the inspection of any stockholder demanding an examination thereof, and that only one such statement can be required during any one year.

It was not until the petition in the present proceeding was executed that there was any suggestion in reference to the retirement of the corporation bonds. In this petition the relator

Second Department, March, 1912.

[Vol. 149.]

declares that he "also desires to know the prices at which such bonds were retired; as it has been from time to time stated, in the financial journals of the city, that such bonds were redeemed at a price above the par value thereof at or about the time when they were being sold in the market at a price considerably below par. And your petitioner shows that no public notice, or notice to the bondholders generally, was given of the corporation's intention to retire such bonds, or of any resolution passed by the Board of Directors for that purpose, nor was the retirement by lot, so as to give all the bondholders an equal opportunity to secure the retirement of their bonds, but said bonds were retired by the payment to a certain few of the bondholders at a price greatly in excess of that at which the officers of the corporation as such might have purchased the bonds in open market." There is here no allegation that the bonds had been redeemed in the manner mentioned; merely that it "has been from time to time stated, in the financial journals of the city," without any information as to the particular financial journals, or of any reason to believe that these journals had any special information on the subject, or even that the relator believed that they had such information. This is met by the affidavit of the president of the corporation to the effect that the reduction in the bonded indebtedness of the corporation was made for the reason that during a period of years it had accumulated a large surplus for the purpose of building new boats, but finding the construction of new boats unnecessary, owing to the new bridges and the tunnel, it "was deemed best in the interests of the stockholders that this surplus should be used for reducing its bonded indebtedness, and thereupon, with the consent of the Central Trust Company, bonds aggregating \$1,000,000 were purchased in the open market at prices known to the petitioner's counsel herein, and the Trust Company, under the terms of said mortgage, canceled the same, as appeared upon the statement of January 1st, 1911, * * * thereby saving to the stockholders nearly two per cent per annum on the capital stock."

It may be that this statement is open to the objection that it does not state whether the bonds were purchased above par at a time when they were selling below par in the open market,

App. Div.] Second Department, March, 1912.

but it is not more open to criticism than the hearsay allegations of the petition in reference to these bonds, and it elsewhere appears from an affidavit of Thomas Read, of the finance committee of the corporation, that “\$1,000,000 of Union Ferry bonds due 1920, and redeemable before that date at not less than 110, were purchased in 1909 and 1910; \$700,000 at 101½ in 1909 — no more could be obtained at that price; then \$300,000 at 102½ in 1910, said bonds having been held by Trust Companies, Insurance Companies, Banks, Banking Houses and individuals, numbering in all forty-two concerns, all of which knew that we were ready to pay the prices above stated. Some others did not care to sell at less than 110, the redeemable price, and still hold the bonds.” Clearly the purchase of these bonds in the open market — for this allegation is not disputed, but is admitted under the rule above cited — was not in derogation of any of the rights of the stockholders. Upon its face it appears to have been an entirely proper disposition to make of a surplus fund for which the corporation had no immediate use, and as the relator has never shown to the court that he desired this information for the protection of any of his rights as a stockholder, or that he has any intention of using the information for the protection of any such right, and it nowhere appears that he has ever heretofore asked for this particular information or that it has been denied to him, we are of the opinion, under the authorities, that he was not entitled to the relief which the order grants. The rule is that before a relator is entitled to an order of this character, he must establish that the information desired has been refused by the corporation, after a demand made therefor, and that it was necessary for him to have the information in order to properly protect his interest in the corporation. (*Matter of Latimer v. Herzog Teleseme Co.*, 75 App. Div. 522; *Matter of Taylor*, 117 id. 348.) No such facts appear in the case now under consideration. The answering affidavits show affirmatively that the affairs of the corporation are being conducted along sound business lines, and the only possible foundation for the order in this case is an allegation based upon the alleged publication of matter in unnamed financial journals, without any reason being given for believing that the statements were

Second Department, March, 1912.

[Vol. 149.]

true, or even that they referred to the time when these purchases of bonds were being made.

The order appealed from should be reversed.

THOMAS, J., concurred; JENKS, P. J., and CARR, J., concurred on the ground that the petition does not disclose a proper demand for the information sought; BURR, J., not voting.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

FREDERICK M. VOORHEES, as Administrator, etc., of FREDERICK M. VOORHEES, JR., Deceased, Appellant, *v.* PETER J. COLLINS, Superintendent of Buildings of the Borough of Brooklyn, Respondent.

Second Department, March 8, 1912.

Municipal corporations — negligence — injury by fall of floor — when superintendent of buildings not personally liable — obligation to appoint subordinates from civil service list.

As the superintendent of buildings in the city of New York is bound to appoint inspectors of buildings certified as competent by the civil service commission, he is not personally liable for a death caused by the fall of a floor on the theory that he was negligent in not properly inspecting the building, where it does not appear that he had any reason to believe that his subordinates were incompetent.

APPEAL by the plaintiff, Frederick M. Voorhees, as administrator, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 24th day of December, 1910, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case on a trial at the Kings County Trial Term.

Alfred C. Cowan, for the appellant.

James D. Bell [*Patrick E. Callahan* with him on the brief], for the respondent.

WOODWARD, J.:

Plaintiff's intestate was killed by the falling of a floor in the Fleet Street African Methodist Episcopal Zion Church in the

App. Div.] Second Department, March, 1912.

borough of Brooklyn on the 27th day of February, 1905. This action is brought against Peter J. Collins, superintendent of buildings, on the theory that the accident was due to the neglect of the said Collins in not seeing that the building was properly inspected prior to the accident. The evidence might be sufficient to establish that the floor fell by reason of the breaking of a supporting girder upon which the floor beams rested, but it is doubtful if there was sufficient evidence to justify the jury in finding that there was any defect in the timber at the point where it broke, or that any amount of inspection would have discovered the weakness. However this may be, we think it is obvious that the superintendent of buildings does not assume the liabilities of an insurer of all the buildings in the borough of Brooklyn on entering the office in that borough. No provision of law requires him to have personal knowledge of the condition of buildings owned and occupied by third persons or corporations. The charter required him to appoint inspectors of buildings. (See Laws of 1901, chap. 466, § 406.) He was required to appoint these from among those whom the civil service commission had certified to be competent and eligible for that position. He could not use his unrestricted choice in making his selection of inspectors. He was bound to assume that the men furnished to him by the civil service commission for his selection were competent, and no facts are proven by which it is made to appear that they were incompetent, or that the defendant had any reason to believe that they were incompetent. Under such circumstances the defendant is clearly not liable to the plaintiff. (*McGuinness v. Allison Realty Co.*, 46 Misc. Rep. 8, 12, and authorities there cited; affd., 111 App. Div. 926.)

The judgment appealed from should be affirmed, with costs.

Present—JENKS, P. J., BURR, THOMAS, CARR and WOODWARD, JJ.

Judgment unanimously affirmed, with costs.

JAMES CONNORS, Respondent, *v.* THE LONG ISLAND RAILROAD COMPANY, Appellant.

Second Department, March 15, 1912.

Railroad — negligence — collision at grade crossing — proof raising question for jury — evidence — weather conditions — testimony of district forecaster.

Action to recover for personal injuries received by the plaintiff who while driving across a railway track was struck by a train. The engineer blew his whistle before the collision, but the question of negligence turned upon whether the signal was timely. Evidence examined, and held, that the questions of the defendant's negligence and the contributory negligence of the plaintiff were properly submitted to the jury.

In such action it is not error to admit for what it is worth testimony by the district forecaster of the United States Weather Bureau based on the bureau records as to the foggy condition of the weather at the time of the accident, although the observations were taken at the weather bureau, there being no objection that the record itself was not put in evidence. The remoteness of the place of observation went merely to the weight of the evidence.

APPEAL by the defendant, The Long Island Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 21st day of June, 1911, upon the verdict of a jury for \$5,200, and also from an order entered in said clerk's office on the same day denying the defendant's motion for a new trial made upon the minutes.

William C. Beecher [Joseph F. Keany with him on the brief], for the appellant.

Jacob Rieger [Marcus Mandelbaum with him on the brief], for the respondent.

JENKS, P. J.:

The scene of the accident was where Neck road, a highway in that part of the city of New York known as Sheepshead bay, crossed over the double surface track of the steam railway of the defendant. About 12.30 P. M., on November 25, 1908, the plaintiff was driving a brewery wagon drawn by two horses along that highway. The wagon, 15 feet long, weighed

App. Div.] Second Department, March, 1912.

4,000 pounds and its load weighed about 4,800 pounds. When the plaintiff attempted to pass over the crossing the hind wheel of his wagon was struck by the train coming upon the further track, and the plaintiff was injured. There was neither signal-man nor gate, nor other means of warning at the crossing. Before collision the engineer saw the wagon and the plaintiff saw the oncoming train. There was no dispute that the engineer of the train blew his whistle before the collision, but the question of negligence tried was whether that signal was given at a proper time. The plaintiff testifies that the whistle was not blown until he was upon the track with the horses; that he heard it first when he was between the two tracks; that the train was then about 95 yards to 300 feet away, and that it came upon him in about 6 seconds. Plaintiff's witness Nies, who was standing in the doorway of her house nearby, with a clear view of the track in either direction, had her attention attracted by the train. She saw the wagon coming across, the train made one loud whistle when "just a little past" her house. This was the only whistle, and there was no other signal. At the time the whistle was blown the wagon was "not quite on the railroad track," but "was just coming along the road." When the whistle was blown the wagon started to cross. There was "just about half of the wagon on the track" when the whistle was blown, and 4 or 5 seconds thereafter there was collision. It is true that her testimony is not entirely clear as to whether the whistle was blown before the plaintiff started to cross or when he was in the act of crossing. The mother of this witness testifies that a succession of shrill whistles began at a point opposite her house, which is 250 or 275 feet distant from the crossing, and that within a few seconds her daughter called out to her that "a man was flying through the air." Mrs. Rennie, a neighbor of the last witness, who was in the yard of her house, heard the whistle, looked up, saw the train coming "very fast," looked toward the crossing, and before she "could think" the train struck the wagon. The horse and wagon were coming across—were on the track about half way over. For the defendant, Mrs. Archer, a resident nearby, testified she was in her hallway when she heard the crossing

Second Department, March, 1912.

[Vol. 149.]

whistle — two long and two short whistles, followed by "a kind of danger whistle," so that she ran to her doorway. The whistle was blown before the train reached her house, but she could not estimate how long before, it might have been "a second or so," the train was coming very fast, and after she stepped back to take her coat from a rack to put about her, she saw the man and barrels descending in air. She had not seen the location of the plaintiff when the whistle was blown. The engineer of the train testifies that he sounded the crossing whistle before he came to these houses. He remembered the situation of the whistling signal post and he sounded the crossing whistle before he came to the post. His automatic bell was ringing. He further testifies that when he saw the plaintiff's team it was about 60 feet from the crossing, whereupon he blew a good warning whistle, which differs from a crossing whistle in being continued as long as possible. The man kept "right on going," and the witness applied the emergency brake. He had never measured the distance of the whistling signal post from the crossing, but judged it to be 400 feet or more — but he could not estimate between 300 and 500 feet. He finally placed that post from 100 to 50 feet the other side of these houses occupied by the said witnesses respectively, and then he indicated that location upon the map by pencil mark. He further testifies that there was another wagon driving upon the Neck road on the opposite side. He blew his whistle to warn the driver of it, who stopped and meanwhile the brewery wagon came along and the witness kept blowing, but plaintiff never paid any attention. He put his hand on the brake when he saw the front wagon, in readiness to use it, and he first tried to stop the train when he saw the plaintiff was not going to stop. His train was traveling from about 20 to 25 miles an hour. The fireman of the train did not see the accident. He was attending the fire, "paying no more attention than I ever did while approaching this crossing to notice whether the whistle was blown, * * * because that is the usual signal all the time," but he heard a sudden, sharp whistle, the emergency brake was applied, he was flung against the boiler, and when the train was stopped he learned of the accident. The trainman at the end of the train noticed the crossing

App. Div.] Second Department, March, 1912.

whistle and thereafter one long whistle, but he could not tell exactly at what point the first whistle was given. A civil engineer testified that the said houses were distant from 300 to 345 feet from the crossing; that the whistling post was about 1,390 feet from the crossing; that such a post should not be nearer a crossing than 1,320 feet, and that there was no whistling post at the place indicated on the map by the locomotive engineer. It was conceded that the tracks were straight-away for one-half a mile. There was evidence, not undisputed, however, that it was a damp, heavy, foggy morning.

I think that the questions of negligence and contributory negligence were submitted properly to the jury. It could have found that the defendant omitted to give any signal at a distance from the highway crossing greater than 400 or 500 feet. The testimony of the engineer that he whistled at the whistling post is much affected by his own testimony that located that post "right opposite the houses," or "Just the other side of the houses, something like 100 feet, may be 50 feet." The plaintiff was traveling on the highway at a lively walk, but stopped his horses when their heads were 10 feet from the track. He looked in both directions and listened, but neither saw nor heard any train. He then "stirred up" his horses "lively" to get them over the tracks, and had almost passed over the further track at the time of the collision. At the stopping point he was "bothered" by the trees and shrubbery so that he could not see further than 50 or 60 or 70 yards. When he passed the trees he had a clear view right down the center of the track, but he testifies that he could only see the engine at the time the whistle was blown, when it was about 300 feet away, and when he was between the tracks. There is evidence, as I have said, that it was a damp, foggy day. It is not incredible as matter of law that he could not have seen the train in time to have prevented collision. The mere fact that it might have been possible for him to do so after his stop and when he stirred up his horses to cross the track, would not defeat his action, but the question remains whether at the time he exercised due care under all the circumstances. (*Parsons v. N. Y. C. & H. R. R. R. Co*, 113 N. Y. 355, 364.) The case is different from

Second Department, March, 1912.

[Vol. 149.]

those where the plaintiffs have testified that they looked from a clear viewpoint of safety under bright atmospheric conditions, and yet did not see what must have been patent to any one.

It is insisted that the court erred in admitting the evidence of the district forecaster of the United States Weather Bureau, whose observations were taken at 100 Broadway, New York city. He testified that foggy weather was recorded both by instruments and by eye observations; that the horizon beyond Coney Island (which is in the general neighborhood and from the viewpoint of such an observer is beyond the scene of the accident) would be visible to his observers, and that if it was cloudy there it could not have been clear at the point of observation; that a fog could be at one place and not at another; that he could tell whether there would be any fog at Coney Island within a reasonable degree of certainty. He then proceeded to describe the atmospheric conditions of the day, and testified that the weather was foggy all day, the fog ranging from light to dense at different parts of the day. On motion made to strike out his testimony, without specification of the objection, the court decided it should stand for what it was worth, under exception. The records of the Weather Bureau are *prima facie* evidence (Code Civ. Proc. § 944); the witness testifies that he could state the weather conditions within the territory and with reference to the particular locations therein with reasonable certainty, and then proceeds to give the facts drawn from the record, without objection that the record was not itself put in. The question of remoteness went to the weight of the evidence. (*Mears v. N. Y., N. H. & H. R. R. Co.*, 75 Conn. 171. See, too, *Central R. R. & B. Co. v. Ingram*, 98 Ala. 394, 395.) I advise that the judgment and order be affirmed, with costs.

Present—JENKS, P. J., HIRSCHBERG, BURR, WOODWARD and RICH, JJ.

Judgment and order unanimously affirmed, with costs.

**CONTINENTAL INSURANCE COMPANY, Appellant, Respondent, v.
JULIA B. REEVE and Others, Defendants, Impleaded with
CITY REAL ESTATE COMPANY, Respondent, Appellant.**

Second Department, March 15, 1912.

Mortgage — foreclosure — rents and profits in hands of receiver — marshaling assets — respective rights of purchaser and second mortgagee in rents and profits — lien of second mortgagee on surplus — interest earned by receiver — interest payable by purchaser on foreclosure.

Rents and profits of mortgaged lands in the hands of a receiver are applicable to the payment of the mortgage debt and costs of foreclosure if the proceeds of the sale are insufficient.

A surplus in the hands of a receiver after the satisfaction of a first mortgage represents the mortgaged estate, and that part of the surplus consisting of rents due after the purchaser on foreclosure makes demand for possession under his deed belongs absolutely to him.

So, too, rents payable in advance and collected by the receiver, but extending beyond the date of the purchaser's demand for possession, should be apportioned to him.

A surplus existing after the foreclosure of a first mortgage should be applied to the satisfaction of a second mortgage, for as that lien is cut off by the foreclosure it is transferred equitably to the surplus.

The purchaser on the foreclosure of a first mortgage and the holder of a second mortgage are not creditors of the same debtor. Hence, although the second mortgagee has other security for his debt, the purchaser on the foreclosure of the first mortgage cannot contend that the lien of the second mortgage does not attach to the surplus, for the equitable rule of marshaling securities applies only where two or more persons are creditors of the same debtor.

Surplus rents and profits in the hands of a receiver after the foreclosure and satisfaction of a first mortgage represent the mortgaged premises and are subject to the lien of a second mortgage; they should not go to the first mortgagee, who bid in the lands on foreclosure. Especially is this so where the order appointing the receiver directed him to hold the surplus subject to the further order of the court.

Where an order directed the receiver on foreclosure to deposit rents and profits with a certain depositary, he should pay to the purchaser only such interest as he actually received, not the legal rate.

A purchaser on foreclosure must pay interest at the legal rate upon any part of the purchase money unpaid after it became due under the terms of sale, whether or no he takes possession.

CROSS-APPEALS by the plaintiff, the Continental Insurance Company, and the defendant, the City Real Estate Company,

Second Department, March, 1912.

[Vol. 149.]

from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 23d day of December, 1910.

William N. Dykman [*Philip S. Dean* with him on the brief], for the plaintiff.

Lynn C. Norris [*Edward M. Perry* with him on the brief], for the defendant City Real Estate Company.

JENKS, P. J.:

These are cross-appeals by the plaintiff and by the defendant City Real Estate Company from an order of the Special Term in an action for foreclosure of a first mortgage on realty. The City Real Estate Company is the owner and the holder of a second mortgage for \$140,500, due, unpaid and next in priority to the said first mortgage, and the only other lien on the said realty. It owns and holds that mortgage as collateral security for a debt of \$28,971.48, due from Pelletreau and Cooper, who were the real owners of the equity in the premises, or at least controlled it. On the day before plaintiff filed the *lis pendens* herein the record title of the realty was in the defendant the Lotus Realty Company. The foreclosure search, continued thereafter, failed to disclose a recorded deed of the premises made to Lewis, a dummy, at the instance of Pelletreau, and so Lewis was not made a party to the action. Shortly before the foreclosure sale this omission was discovered, and thereupon the plaintiff, in consideration of Pelletreau's procurement of a deed of the premises from Lewis to the defendant the Lotus Realty Company, stipulated in writing that plaintiff would bid at the foreclosure sale "at least the amount found due by the said judgment, together with its taxable costs and disbursements and allowance, with interest, less any sum in the hands of the Receiver." It is not contended that the said second mortgagee, the City Real Estate Company, had any hand in the conveyances to the dummy Lewis, or was a party to the said arrangement for the said reconveyance by Lewis, or to any agreement or stipulation incident thereto. Upon motion of the plaintiff a receiver *pendente lite* of the rents and profits of the premises had been

App. Div.] Second Department, March, 1912.

appointed by an order that directed him, after deduction of the proper charges and expenses, to apply the residue of the rents to the payment and satisfaction of the amount remaining unpaid on the plaintiff's bond and mortgage, to bring all rents into court by deposit with the Title Guarantee and Trust Company and not pay out, but to safely keep, subject to the further order of the court, all such moneys, "excepting so far as payments and disbursements are authorized by the terms of this order." The plaintiff bid in the premises upon the foreclosure sale held on August 24, 1909, for \$365,000, the amount, by plaintiff's estimate, required by its said stipulation (in addition to taxes, which the plaintiff considered within the spirit of its stipulation), less only the money in the hands of the receiver. But in casting up that amount the plaintiff included the tax of 1907, an item of \$3,700 in round numbers, when in fact that tax had been paid. Pelletreau refused plaintiff's application that he permit the bid to be reduced by that item, and the plaintiff thereupon moved at Special Term for reduction of its bid by such item. The Special Term granted the motion, but upon appeal, for the reasons stated in the opinion of the court per BURR, J., the order was reversed and the motion was denied, without prejudice to an application on the part of the plaintiff to rescind the sale if it be so advised. (*Continental Insurance Co. v. Reeve*, 135 App. Div. 737.) An appeal from our decision was dismissed by the Court of Appeals. (198 N. Y. 595.) The order now under review was made thereafter at the instance of the defendant, the said City Real Estate Company, which moved for a reduction of the deficiency, found by the report of the referee to sell under the judgment of foreclosure, by deducting therefrom \$3,387.43, for direction that the deficiency judgment be for that reduced amount, for determination that the said City Real Estate Company is entitled to the balance in the receiver's hands after deduction of the amount of the deficiency as so reduced, for direction that the receiver pay said balance to the said City Real Estate Company, and for such other and further relief as might be just. At the hearing of the motion, plaintiff read and filed a stipulation of the said City Real Estate Company to the effect that, in addition to the bond and mortgage covering

Second Department, March, 1912.

[Vol. 149.]

the premises in suit and in addition to any claim on the fund in the hands of the receiver, it has securities collateral to the note of Pelletreau and Cooper amply sufficient to pay the note or any balance due thereon in full with interest. The stipulation, however, was made expressly "without prejudice to the contention of said defendant City Real Estate Company that the fact of its possession of such collateral securities is immaterial upon this motion." The Special Term granted the motion, amended the referee's report of sale by insertion of the \$365,000 as the amount of the bid instead of \$361,612.55, directed that the difference between these sums be deducted from the deficiency as found by the report of sale, reduced the deficiency accordingly, ordered the receiver to pay to the plaintiff the reduced sum, with interest thereon at six per cent per annum from September 23, 1909, to the date of the entry of the order in satisfaction of the deficiency and to pay to the City Real Estate Company the balance of the funds in his hands as receiver. The plaintiff appeals generally, the said City Real Estate Company appeals "in so far as the said order fails and omits to provide for a further reduction of said deficiency by deducting therefrom interest on \$3,387.45 from September 23rd, 1909, as prayed for in the said defendant's notice of motion herein, and from so much and such part of said order as directs the receiver herein to pay to plaintiff or its attorney interest on the said deficiency as thus reduced at the rate of six per cent per annum from September 23rd, 1909, to the date of entry of said order."

I shall consider first the appeal of the plaintiff, whose contention is that upon the said stipulation of the defendant, the City Real Estate Company, the doctrine of marshaling of assets should be applied in that the said City Real Estate Company, having two funds as security for its debt, should be relegated solely to the securities which it has in its hands.

The fund which is in controversy is made up of the rents and profits of the realty collected by the receiver. If the amount received under the foreclosure sale did not suffice to satisfy the plaintiff's claim as mortgagor (inclusive of the expenses incidental to its action for foreclosure [*Bushwick Savings Bank v. Traum*, 26 App. Div. 532; affd., 158 N. Y. 668]), then the rents

App. Div.] Second Department, March, 1912.

and profits in the hands of the receiver are applicable to the extent of the full satisfaction of such claim. (*Cincinnati National Bank v. Tilden* 50 N. Y. St. Repr. 366; affd., 140 N. Y. 620; Thomas Mort. § 898 and cases cited.) The fund then is surplus; namely, the amount that remains after the satisfaction of the plaintiff's claim as first mortgagor. Such surplus represents the mortgaged estate. If the sum in the hands of the receiver consists in part of rents due after the purchaser at the foreclosure sale made demand for possession under his deed, they belong absolutely to that purchaser. And so any rents payable in advance and collected in advance by the receiver extending beyond the date of such demand may be apportioned to that purchaser. (Jones Mort. § 1659.) As the surplus for distribution only exists after the plaintiff's claim as mortgagor has been fully satisfied, the plaintiff cannot be a claimant perforce of his mortgage. Concededly its only other relation thereto is that of purchaser at the foreclosure sale. The status of the City Real Estate Company is that of lienor next in priority perforce of its second mortgage which was due. The struggle, then, over this surplus is between the purchaser at the foreclosure sale and such lienor. The purchaser acquired the same estate and no other or greater than would have vested in the mortgagee if the equity of redemption had been foreclosed. (Thomas Mort. § 1013; Jones Mort. § 737.) The general rule is that such surplus would be applied to the satisfaction of this second mortgage, inasmuch as that lien, cut off by the foreclosure proceedings, is transferred equitably to that surplus. (*Vogel v. Nachemson*, 137 App. Div. 200; affd., 199 N. Y. 535; *Quackenbush v. O'Hare*, 129 id. 488. See, too, *Burchell v. Osborne*, 119 N. Y. 486; *Bartlett v. Gale*, 4 Paige, 503; Jones Mort. § 1688.) The question then presented by the plaintiff is whether it as purchaser is entitled to invoke the rule of the marshaling of assets against this second mortgagee. In *Stevens v. Church* (41 Conn. 369) the Supreme Court of Errors said: "The principles of equity in regard to the marshaling of securities are not applicable to the case of a mortgagee and a subsequent purchaser of the equity of redemption, but are confined to cases where two or more persons are creditors of the same debtor, and have successive demands

property, the one prior in right having other
See 1 Story Eq. Juris. [13th ed.] 639, note; Jones
691a; *Cherry v. Monro*, 2 Barb. Ch. 618.) Such
this second mortgagee are not creditors of the
(4 Pom. Eq. Juris. [3d ed.] § 1414, note 4.) I
that the plaintiff cannot prevail to the exclusion
Real Estate Company. (See, too, *Quackenbush v.*
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The receiver was appointed at the instance of the
directed to apply the rents and profits to the sat-
the plaintiff's bond and mortgage, that fact pre-
on why the surplus (which exists after such
should be diverted from application to the second
the benefit of the plaintiff as purchaser, but the
I should direct the application sought by the
gee, inasmuch as the fund represents t
as subject to the lien of such mortgage
4 Hun, 521; *Vogel v. Nachemson*, supr

Moreover, the order of appointment di-
ved after the application to the satisfac-
and mortgage shall be kept subject to
the court.

Under the appeal of the City Real Estate C
that the order should not provide inter-
num on the said sum which the receiver
“in satisfaction of its said deficiency.”
vention is sound. The order obtained by t
the receiver to deposit these rents and pro-
sitary, and the plaintiff is entitled to any
ever gained by such deposit, apportioned
the plaintiff, and not to interest at the leg-
Banning, 140 N. Y. 227.) The City Real
ther insists that the plaintiff as purch-
interest upon the sum that remains
purchase price of the property. The confirma-
the court relates to the time of the delivery
purchaser. (Thomas Mort. § 1021 and auth
whatever time the purchase money w
ns of sale, the purchaser should be compel



App. Div.] Second Department, March, 1912.

pay interest at the legal rate upon any part of the purchase money that remained thereafter unpaid. The purchase money is regarded as the property of the vendor when the vendee has the right of possession, and, therefore, interest is payable thereon whether the purchaser does or does not take possession. (Sug. Vend. [Am. notes by Perkins] 314.) It does not appear that this balance of the purchase money has been appropriated, or that the purchaser has received no benefit therefrom within the exception noted in *Bostwick v. Beach* (105 N. Y. 661), or that the plaintiff has been in any way excluded from the enjoyment of its purchase, to which it took conveyance on September 23, 1909. The delay in the termination of these proceedings was not attributable to the vendor. Presumably the plaintiff has been in the enjoyment of the rents and profits since that time.

The order is modified, and as modified affirmed, with ten dollars costs and disbursements to the appellant the City Real Estate Company.

HIRSCHBERG, BURR, THOMAS and CARR, JJ., concurred.

Order modified in accordance with opinion, and as modified affirmed, with ten dollars costs and disbursements to the appellant City Real Estate Company. Order to be settled before the presiding justice.

MIRIAN A. KENT, Respondent, *v.* LESLIE B. WILSON and DUNCAN M. FERGUSON, Doing Business under the Copartnership Name of L. B. WILSON & COMPANY, Appellants.

Second Department, March 15, 1912.

Bailment — action to recover moneys from depositary — evidence not showing accord and satisfaction — account stated.

Action to recover a balance of moneys deposited with the defendants to be accounted for by them. Evidence examined, and held, insufficient to establish an accord and satisfaction, and that the jury would have been justified in finding that the plaintiff was not indebted to the defendants.

Second Department, March, 1912.

[Vol. 149.]

The rendition of an account does not make an account stated, and the failure to object only raises a presumption which may be rebutted by proof of any circumstances tending to a contrary conclusion.

APPEAL by the defendants, Leslie B. Wilson and another, doing business under the copartnership name of L. B. Wilson & Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 24th day of June, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 26th day of June, 1911, as modified by an order entered on the 3d day of July, 1911, denying the defendants' motion for a new trial made upon the minutes.

Harold C. Mitchell, for the appellants.

Harry E. Lewis [*Charles F. Murphy* with him on the brief], for the respondent.

JENKS, P. J.:

The plaintiff deposited \$1,985.54 with the defendants, who are bankers and brokers, to be accounted for. The defendants heretofore have accounted for \$985.54 thereof and this action is to recover the balance. The deposit represented the proceeds of policies payable to the plaintiff upon the life of plaintiff's former husband, who died in the service of the defendants. There is proof that for a period the defendants sent monthly statements of this account to the plaintiff, which were received without demur, and the contention of the appellants is that as thereby "a complete accord and satisfaction was shown," the trial court should have dismissed the plaintiff or should have directed the verdict against her. The first statement read in evidence is dated September 30, 1908, and shows credit for the deposit, with interest, and debits of items specified as cash, each of small sums save "September 30 Cash 1,000." The subsequent statements are drawn with respect to the balance shown upon this first statement. Giving due probative force to this evidence as to the account and the plaintiff's conduct with respect to it, the proof was not sufficient to cast liability upon the plaintiff if no debt or obligation existed against her and in favor of the defendants. (*Austin v. Wilson*, 33 N. Y.

App. Div.] Second Department, March, 1912.

St. Repr. 503 and cases cited; *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. Supp. 587; *Chase v. Chase*, 191 Mass. 556; *Davis v. Seattle Nat. Bank*, 19 Wash. 65; *French v. French*, 2 M. & G. 644.) Upon the evidence the jury could have determined that there was neither existing debt nor obligation as between the plaintiff and the defendant, for although defendants testified that the plaintiff agreed that they could apply this \$1,000 upon a shortage discovered in the accounts of her said husband, which they had done, the plaintiff, while admitting that the defendants had informed her of a shortage and that they could keep \$1,000 of this deposit to apply thereto, denied that she had ever said to the defendants that she was willing or was satisfied that any such application should be made. The verdict was for the plaintiff.

It is well settled that the rendition of an account does not make an account stated, and the omission of objection but raises a presumption capable of rebuttal "by proof of any circumstances tending to a contrary conclusion." (*Guernsey v. Rexford*, 63 N. Y. 631.) The plaintiff testifies that one of the defendants told her to draw against the deposit up to \$1,000, that he would inform her when the deposit was thus reduced, and that thereupon she must not draw against it by checks or drafts, but upon personal application to him. And her contention is that this item of \$1,000 represented to her a deduction of this fund to be reserved against her checks or drafts. The said item, "Cash 1000" is not so self-explanatory as to reject as incredible this testimony of the plaintiff's understanding of it.

The judgment and order must be affirmed, with costs.

HIRSCHBERG, BURR, WOODWARD and RICH, JJ., concurred.

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOHN E. SCHULTZ, Appellant.

Second Department, March 15, 1912.

Crime — usury — Banking Law, section 314 — security not necessary — Banking Law and Penal Law not inconsistent — repeal by implication — when defendant taking usury liable as principal — defenses — burden of proof.

One who makes a loan of money less than \$200 for more than the legal rate of interest is guilty of a violation of section 314 of the Banking Law, although no security is taken. But where the usurious loan is on personal credit, security must be given in order to constitute a misdemeanor.

Section 2400 of the Penal Law, re-enacting chapter 661 of the Laws of 1904, which made the taking of security an essential element to the crime of usury as therein defined, did not repeal by implication section 314 of the Banking Law.

Repeals by implication are not favored and are not effected unless two statutes are clearly inconsistent, or the new statute is intended to establish a complete system for the entire subject-matter of the legislation.

Section 2400 of the Penal Law and section 314 of the Banking Law are not inconsistent, but are complementary to each other, the latter relating to usury in certain counties only.

A person who makes a usurious loan contrary to section 314 of the Banking Law is liable as a principal, although he made the loan on behalf of another.

In a prosecution for said crime the People need not show that the defendant was not one of the particular corporations authorized by the Banking Law to charge interest on loans in excess of six per cent. The burden is upon the defendant to bring himself within the exception of the statute.

APPEAL by the defendant, John E. Schultz, from a judgment of the Court of Special Sessions of the city of New York, rendered against the defendant on the 12th day of May, 1911, convicting him of the crime of usury in violating section 314 of the Banking Law.

Ernest P. Seelman and Gates Hamburger, for the appellant.

Leroy W. Ross, Assistant District Attorney [John F. Clarke, District Attorney, with him on the brief], for the respondents.

Walter S. Heilborn, filing brief, by permission, for Russell Sage Foundation.

App. Div.] Second Department, March, 1912.

HIRSCHBERG, J.:

The defendant was tried on an information charging him in substance with having violated section 314 of the Banking Law (Consol. Laws, chap. 2 [Laws of 1909, chap. 10], § 314), in that on the 26th day of October, 1910, at the borough of Brooklyn, county of Kings, he loaned and procured to be loaned to one Charles Platt the sum of twenty-five dollars, seeking to obtain and obtaining for the said loan more than six per cent interest. No evidence was offered on behalf of the defendant. The uncontradicted evidence adduced on behalf of the People established the facts that in October, 1910, one Charles Platt, answering a newspaper advertisement, applied to the offices of the State Loan and Realty Association at 59 Court street, borough of Brooklyn, Kings county, for a loan of twenty-five dollars; that he found the defendant at those offices and stated the purpose of his visit to him; that the defendant informed him that such a loan would cost six dollars and eighty-five cents per month for six months; that after Platt had signed certain papers, including an agreement to pay sixteen dollars and ten cents for services, brokerage, etc., and a six months' note for twenty-five dollars at six per cent, payable to the order of one C. H. Fuller, the defendant said, "I will make this loan," and procured twenty-five dollars from a drawer in the outer office and gave that money to Platt. It also appears that in the following month Platt's wife, on his behalf, paid the defendant six dollars and eighty-five cents and received a receipt from the defendant reading as follows:

"11/28/10.

"Received of Charles T. Platt, \$6.85/100, on Account

"J. E. S."

When the defendant was arrested memoranda were found in his possession showing the time agreed upon for the repayment of the loan. The learned counsel for the appellant asks for a reversal on the ground that no security was taken for the loan; that the evidence does not connect the defendant with the alleged crime, and that no evidence was adduced showing that the defendant was not one of the corporations authorized by section 314 of the Banking Law to exact more than six per cent interest on loans of less than \$200.

Second Department, March, 1912.

[Vol. 149.]

Section 314 of the Banking Law reads as follows: “§ 314. Prohibitions. In any such county no person or corporation, other than corporations organized pursuant to this article, shall directly or indirectly charge or receive any interest, discount or consideration greater than the legal rate of interest upon the loan, use or forbearance of money, goods or things in action less than two hundred dollars in amount or value, or upon the loan, use or sale of personal credit in any wise where there is taken for such loan, use or sale of personal credit any security upon any household furniture, apparatus or appliances, sewing machine, plate or silver-ware in actual use, tools or implements of trade, wearing apparel or jewelry. The foregoing prohibition shall apply to any person who, as security for any such loan, use or forbearance of money, or for any such loan, use or sale of personal credit as aforesaid, makes a pretended purchase of property from any person, and permits the owner or pledgor to retain the possession thereof, or who, by any device or pretense of charging for his services or otherwise, seeks to obtain a larger compensation in any case hereinbefore provided for. Any person, and the several officers of any corporation, who shall violate the foregoing prohibition, shall be guilty of a misdemeanor, and upon proof of such fact the debt shall be discharged and the security shall be void. But this section shall not apply to licensed pawnbrokers making loans upon the actual and permanent deposit of personal property as security; nor shall this section affect in any way the validity or legality of any loan of money or credit exceeding two hundred dollars in amount.”

The language of the statute indicates clearly that where the loan is a loan of money of less value than \$200 for more than the legal rate of interest, the giving of security is not a necessary element of the crime. On the other hand, where the loan is of personal credit, the statute specifically states that security must be given in order to constitute the misdemeanor. The language of former section 378 of the Penal Code (as amd. by Laws of 1895, chap. 72) was substantially identical in this respect with the language of section 314 of the Banking Law. In *People ex rel. Beebe v. Warden of City Prison* (89 N. Y. Supp. 322; affd., 86 App. Div. 626; 176 N. Y. 577) section

App. Div.] Second Department, March, 1912.

378 of the Penal Code received a construction consonant with the plain meaning of its language, and the court held that where the loan was a loan of money the taking of security was not an essential element of the crime, but that where the loan was of personal credit the taking of security was essential. We see no reason to assume that the Legislature intended different meanings when it employed the same language in these two statutes. That the plain meaning of section 314 of the Banking Law is as stated might almost be conceded by the learned counsel for the appellant when he bases his claim that the appellant's act could only constitute a crime if security had been accepted upon the ground that the Legislature, after the construction given section 378 of the Penal Code in the *Beebe Case (supra)*, amended that section so that the taking of security became an essential element of the crime of usury as therein defined. (See Penal Code, § 378, as amd. by Laws of 1904, chap. 661; now Penal Law, § 2400.) This amendment of section 378, the learned counsel for the appellant contends, operated as an implied repeal of that portion of section 314 of the Banking Law making it a misdemeanor to loan sums of money less than \$200 in value at more than the legal rate of interest without security.

It is well settled that repeals by implication are not favored and are not effected unless the two statutes are clearly inconsistent, or the new statute is intended to establish a complete system for the entire subject-matter of the legislation. (*Matter of Tiffany*, 179 N. Y. 455; *Czarnowsky v. City of Rochester*, 55 App. Div. 388; affd., 165 N. Y. 649; *Davis v. Supreme Lodge, Knights of Honor*, Id. 159; *Casterton v. Town of Vienna*, 163 id. 368.) We do not think the amendment to section 378 of the Penal Code (now Penal Law, § 2400) inconsistent with section 314 of the Banking Law, or that the Legislature intended section 2400 of the Penal Law to apply to the conditions sought to be remedied by section 314 of the Banking Law. Section 314 of the Banking Law is a part of article 10 of chapter 10 of the Laws of 1909 (Consol. Laws, chap. 2). Article 10 (as amd. by Laws of 1910, chap. 127) provides for the organization of corporations of a quasi-charitable nature for the purpose of making small loans to needy persons. Such

Second Department, March, 1912.

[Vol. 149.]

corporations are authorized to charge prescribed rates of interest in excess of six per cent per annum, and the profits of such corporations are limited. Such corporations are further limited in their operations to counties containing or contained within an incorporated city. By section 314 loans of money of less value than \$200 at more than the legal rate of interest are misdemeanors when made by any person or corporation other than such corporations in any county where such corporations are authorized to do business. Thus it appears that the acts prohibited by section 314 of the Banking Law are not crimes in every part of the State. The making of the prohibited loans constitutes a misdemeanor in certain counties only, Kings county being included. The purpose of the act is the protection of the needy from extortion, and the Legislature, in accomplishing that purpose, has not only limited the protected class to small borrowers, but has confined the operation of the law to those comparatively thickly settled portions of the State where the evils sought to be eliminated were deemed most likely to prevail. Section 378 of the Penal Code (as amd., now being Penal Law, § 2400) on the other hand established a general policy for the entire State. Read together, the two statutes provide that the taking of security shall be an essential element of the crime of usury, except when the loan is a loan of money less than \$200 in value, made in certain localities by other than certain quasi-charitable corporations. The purpose of the two statutes is complementary, and in that sense harmonious rather than inconsistent. One establishes a general rule, the other excepts a certain class from the hardship that might result were the general rule universally applied.

In the case at bar more than the legal rate was exacted for a loan of money less than \$200 in amount in a county where such loans are prohibited by section 314 of the Banking Law, and such act constitutes a misdemeanor within the meaning of that section.

We think the undisputed evidence sufficiently connects the defendant with the commission of the crime. The fact that the defendant made the loan on behalf of another is immaterial. The offense charged is a misdemeanor, and the defendant's conceded participation in the illegal acts makes him

App. Div.] Second Department, March, 1912.

liable as a principal. (Penal Law, § 27; *People ex rel. Beebe v. Warden of City Prison, supra.*)

The claim that the judgment should be reversed because the State did not prove specifically that the defendant was not one of the corporations authorized by the Banking Law to make the prohibited loan is not sound. Section 314 of the Banking Law makes it a misdemeanor for any person or corporation other than certain excepted corporations to exact more than the legal rate of interest for the loan of sums of money less than \$200 in value. The excepted corporations must consist of five or more persons (Banking Law, § 310, as amd. by Laws of 1910, chap. 127), and we think it may be assumed, as matter of law, that the defendant could not constitute such an excepted corporation. Assuming that others might have been incorporated in his name, it is obvious that he alone could not be so incorporated. However this may be, the corporations authorized to charge the generally prohibited rate of interest constitute a class excepted by proviso from the general operation of the statute, and it is settled that under such circumstances any facts bringing the defendant within the exceptions contained in such proviso are matters of defense which he must prove in the first instance, although on all the evidence, including that to establish such defense, the prosecution would have to establish its case beyond a reasonable doubt. (*People v. McIntosh*, 5 N. Y. Cr. Rep. 38; *People v. Meyer*, 8 N. Y. St. Repr. 256; *People v. Briggs*, 114 N. Y. 56; *Richardson v. State*, 77 Ark. 321.)

The judgment of conviction should be affirmed.

JENKS, P. J., THOMAS, WOODWARD and RICH, JJ., concurred.

Judgment of conviction of the Court of Special Sessions affirmed.

ELIZABETH H. STERLING, Plaintiff, *v.* LOUIS V. HEYDENREICH and Others, as Executors, etc., of EMILE HEYDENREICH, Deceased, Defendants.

Second Department, March 8, 1912.

Will construed — bequest of interest in copartnership — rights of legatees as against residuary legatees.

Where a testator in express terms bequeathed to his son "all my interest, right, title and claim in and to, and my property in the copartnership or firm" of which he was a member, he conveyed, not only all his interest in the firm as a member, but all his property rights therein, including cash on hand, outstanding accounts and merchandise; these do not go to the residuary legatees.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Henry Stengel, Jr., for the plaintiff.

William F. Connell, for the defendants.

HIRSCHBERG, J.:

The alleged controversy in this case relates to the construction to be given to the 2d clause or paragraph of the will of Emile Heydenreich, deceased. He died on the 16th day of March, 1911, the will having been executed on the 19th day of February, 1908, and admitted to probate in Kings county, where he resided. The plaintiff is the only daughter of the testator, and by the will bonds and mortgages aggregating the sum of \$100,000 were bequeathed to her. To his wife the testator gave securities aggregating \$60,000 and his household furniture. After providing for other small legacies, not necessary to detail, he gave and bequeathed all the residue of his personal estate to his wife, his son and his daughter equally. The deceased was a member of the firm of E. Fougera & Co. at the time of the making of the will and at the time of his death, and the 2d clause of the will is as follows: "I give and bequeath unto my son, Louis V. Heydenreich, all my interest, right, title and claim in and to, and my property in, the copartnership or firm of E. Fougera & Co., situate in the Borough of Manhattan, City and State of New York."

App. Div.] Second Department, March, 1912.

At the time of the death of the testator there was an unascertained profit in the business of the firm of E. Fougera & Co., consisting of money on hand, outstanding accounts and merchandise, to which the interest of the deceased applied, and the contention on the part of the plaintiff is that the right and claim of the deceased in such unascertained profits is a part of the residuary estate and not a part of the legacy bequeathed to the son by virtue of the 2d clause of the will.

The controversy was submitted without oral argument, and the plaintiff's printed brief presents no reason why the claim is made on her behalf. No authorities are cited in support of it, and none have been found. It would be impossible to frame a paragraph in more comprehensive, positive and precise terms than the one in question, as a bequest which should cover everything to which the testator might be entitled as a member of the firm at the time of his death. The bequest covers, not only all the interest, right, title and claim of the testator in the firm as a member thereof, but also all his property in the firm. The language is clear, precise and unambiguous, and it carries to the legatee everything which the deceased was entitled to as a member of the firm on its dissolution at the day of his death.

The judgment, therefore, must be in favor of the defendants, who are the executors and residuary legatees, but under the terms of the submission, without costs.

JENKS, P. J., BURR, WOODWARD and RICH, JJ., concurred.

Judgment for defendants on agreed statement of facts, without costs.

JOHN J. TRACY, Respondent, *v.* HEDDEN CONSTRUCTION COMPANY, Appellant.

Second Department, March 15, 1912.

Master and servant — negligence — injury by stepping upon nail — proof not justifying recovery — assumption of risk.

A workman employed in the construction of a building cannot hold his master liable for injuries received when leaving the building at nightfall by stepping upon a nail in a loose piece of planking left upon a runway

Second Department, March, 1912.

[Vol. 149.]

where the evidence shows that the plank was not there within half an hour of the accident. The master cannot be charged with constructive knowledge that the obstruction was there.

Moreover, where it appears that in constructing such building loose boards and planks were strewn about, the plaintiff in using the runway to leave the building assumed the risk of the existing conditions.

APPEAL by the defendant, the Hedden Construction Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 29th day of June, 1911, upon the verdict of a jury for \$750, and also from an order entered in said clerk's office on the 1st day of July, 1911, denying the defendant's motion for a new trial made upon the minutes.

Allan E. Brosmith [Amos H. Stephens with him on the brief], for the appellant.

M. E. Kelley [Christian S. Lorentzen with him on the brief], for the respondent.

HIRSCHBERG, J.:

The plaintiff was injured while working in the employ of the defendant, a company engaged in the erection of a building on the site of the former Fifth Avenue Hotel, Twenty-third street and Broadway, in the borough of Manhattan. He was at work on the fifth floor of the building on the day of the accident, namely, October 30, 1908, and in common with the other workmen was preparing to leave the building at about a quarter of an hour before sunset. On that day, in the progress of the work, the girders of the fifth floor had been only partially covered by loose scaffolding and narrow runways with open spaces on either side. The runway was only two feet wide, and someone had left a piece of planking across it with a nail projecting through the plank. The plaintiff at the time was engaged in collecting empty cement bags on the different floors, and at the time of the accident was doing that work on the fifth floor. He stepped upon the nail in the piece of plank referred to, and the nail, penetrating his foot, caused the injury complained of. He testified: "I was walking along the runway and there was a piece of a plank across the runway with a nail sticking through it, and it was dark; there was no

App. Div.] Second Department, March, 1912.

lights in the building, and I couldn't see this across the runway, and I stepped on the nail and it went right through my foot. This took place right in the center of the fifth floor. I didn't see the end of the plank which contained the nail until after I stepped on it. I could hardly see it then, it was so dark."

There was evidence given to the effect that the place was dark, and it is undisputed that there were no artificial lights. The case was submitted to the jury on the theory that the defendant was guilty of negligence in failing to furnish artificial light at the time. There is no claim that the conditions on the day in question differed from those which prevailed on other days while the plaintiff was working in the building. He had been at work there several months. About 200 men were employed in the work, and nothing appeared to indicate that an accident such as occurred at the time in question was to have been reasonably anticipated by either the defendant or its employees. One of the plaintiff's witnesses testified that he had used the runway in question several times on the afternoon of October thirtieth, the last time within twenty minutes or half an hour prior to the plaintiff's accident, and that the piece of plank with the nail in it was not there then. I do not see how the defendant could be charged with constructive knowledge of the presence of the plank with the nail in it on the runway. The learned counsel for the respondent states in his brief that "It is perfectly well known that in all building operations loose ends of boards or planks will be strewn about." If this be so, it would seem that the condition herein complained of was one of the necessary risks of the employment, and that the plaintiff in using the runway at the time he did assumed whatever risk was incident to the conditions then prevailing.

The judgment and order should be reversed.

JENKS, P. J., BURR, WOODWARD and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

STATEN ISLAND SHIPBUILDING COMPANY, Appellant, *v.* GEORGE B. SPEARIN, Doing Business under the Name of SPEARIN & PRESTON, Respondent.

Second Department, March 15, 1912.

Contract — construction — ambiguity — province of court and jury — construction dependent upon facts aliunde.

Where a contract is ambiguous, the ambiguity should not be construed in favor of the person who wrote it.

Where in order to construe a contract it is necessary to examine facts *aliunde* in connection with the writing, the construction is a mixed question of law and fact to be submitted to the jury under proper instructions. But as a general rule the construction of the written instrument is a question of law for the court.

Thus, where by the terms of a contract it is a question as to whether a defendant who had agreed to raft second-hand timber and piles required him also to raft certain long wooden platforms, the construction in this respect should be submitted to the jury and the verdict should not be set aside.

APPEAL by the plaintiff, the Staten Island Shipbuilding Company, from an order of the Supreme Court, made at the Richmond Trial Term and entered in the office of the clerk of the county of Richmond on the 28th day of March, 1911, granting the defendant's motion to set aside a verdict in favor of the plaintiff and for a new trial on the ground that the verdict was contrary to law.

Martin A. Ryan, for the appellant.

Alfred S. Brown, for the respondent.

HIRSCHBERG, J.:

This action was brought to recover damages for the breach of a written agreement, signed by the defendant and accepted by the plaintiff. The agreement was in the form of a letter (Plaintiff's Exhibit 1), which reads in part as follows: "We accept your verbal proposition to build two Scows. * * * Our understanding is that the price of these scows delivered will be \$3,700, and that you will make us an allowance thereon of \$2,700 for the second-hand piles and timber which we are removing from the St. George Terminal, S. I., *above to include*

App. Div.] Second Department, March, 1912.

the five long platforms between the tracks, and all other material below the top level of deck. * * * It is also our understanding that we are to raft this second-hand timber and piles, and that you will tow it away from the work at your own expense, as we get it ready." The answer denied that the defendant agreed to raft the five long platforms, and it appearing on the trial that he failed to do so, the principal question on the trial was as to the proper interpretation of the agreement. That the learned trial justice considered the agreement ambiguous is evidenced from a portion of his charge as follows: "I am going to leave it to you to decide how far there rested upon the defendant in this case the obligation to raft material which was covered by this contract. If the defendant failed to raft, that is, put in the water and place in rafting condition, material that had to be rafted, then in that respect the defendant failed to perform his contract. If he did raft all that it was required to raft, then there is no cause of action here on the part of the plaintiff against the defendant, because the only thing mentioned here is rafting." The jury found for the plaintiff in the sum of \$1,514.50 and interest, and in setting aside the verdict the court handed down the following opinion: "The defendant was under obligation to raft second-hand piles and timbers—long stuff only. This conclusion follows the construction by the Court of the written agreement. To submit the questions to the jury was error. Verdict set aside and new trial granted."

While it is quite clear that the defendant's agreement was to raft "long stuff only," the qualifying or explanatory phrase "above to include the five long platforms between the tracks" must not be overlooked. "Long platforms," undisputedly of wood, surely may be included in the description "long stuff only," and there was no evidence that the long platforms could not be rafted. If, as it appears, the contract is ambiguous, the ambiguity should not be construed in favor of the defendant, who wrote it. As was said by the court in *Gillet v. Bank of America* (160 N. Y. 549, 555): "The reason of the rule that the language of an instrument is to be construed against the person who proposes it rather than against the person who is invited to accept it, is that men are supposed to take care of themselves, and that he who chooses the words by which a

Second Department, March, 1912.

[Vol. 149.]

right is given ought to be held to the strict interpretation of them, rather than he who only accepts them."

In order to determine the only question at issue, whether the parties intended that the five long platforms should be rafted, it was necessary to examine facts *aliunde* in connection with the written language. This the court apparently did when it decided that the long platforms were not "long stuff," but the question was a mixed question of law and fact, and in submitting it to the jury the court committed no error. In *Trustees of East Hampton v. Vail* (151 N. Y. 463) the court said (p. 470): "While it is a general rule that the construction of a written instrument is a question of law for the court, yet, where its interpretation depends upon the sense in which the words were used, or depends upon facts *aliunde* in connection with the written language to ascertain the intent of the parties, the question becomes a mixed question of law and fact."

If it was not error to submit the question to the jury, the court erred in setting aside the verdict on account of that supposed error. The order should, therefore, be reversed and the verdict reinstated.

JENKS, P. J., BURR, WOODWARD and RICH, JJ., concurred.

Order reversed, with costs, and verdict reinstated.

DANIEL DOUGLASS and JOHN HANN, Doing Business under the Firm Name and Style of DOUGLASS & HANN, Respondents, *v.* F. W. CARLIN CONSTRUCTION COMPANY and Others, Appellants, Impleaded with THE CITY OF NEW YORK, Defendant.

Second Department, March 29, 1912.

Mechanic's lien — foreclosure — allegation that no other action has been brought upon debt — amendment of complaint upon trial.

While, in a suit to foreclose a mechanic's lien, it is necessary that the complaint allege, for the information of the court, that no other action has been brought upon the debt, it is within the discretion of the court, under the provisions of section 723 of the Code of Civil Procedure, to permit an amendment of the complaint upon the trial by inserting such an allegation, it being "material to the case."

App. Div.] Second Department, March, 1912.

APPEAL by the defendants, the F. W. Carlin Construction Company and others, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 7th day of June, 1911, upon the decision of the court rendered after a trial at the Kings County Special Term.

George H. D. Foster, for the appellant F. W. Carlin Construction Company.

Harry C. Wingate, for the appellants John J. Carlin and Thomas G. Carlin.

Alfred J. Gilchrist [*Jacob Neu* with him on the brief], for the respondents.

WOODWARD, J.:

This is an action to foreclose a mechanic's lien, resulting in a judgment in favor of the plaintiffs. The plaintiffs as copartners were sub-contractors of the defendant F. W. Carlin Construction Company, which company had a contract with the defendant, the City of New York, for the construction or alteration of the Williamsburgh or new East River bridge. It is not questioned that the plaintiffs performed certain labor and furnished certain materials to said defendant Carlin Construction Company, but a controversy arose as to the value of the services and materials, and the plaintiffs attempted to file a lien. In this they were unsuccessful, because of defects in the notice, and thereafter, and on the 30th day of October, 1908, the plaintiffs filed with the comptroller and the commissioner of bridges of the city of New York a second notice of lien, set out in the complaint, and which furnishes the foundation of the present action for the foreclosure of such lien. This second lien was discharged by a bond of the defendant Carlin Construction Company, with the defendants John J. Carlin and Thomas G. Carlin as sureties. It is admitted that the Carlin Construction Company is liable to the plaintiffs for the reasonable cost of the labor and materials furnished in this work, and that the plaintiffs would be entitled to a personal judgment for such sum in the present action, but it is urged that

Second Department, March, 1912.[Vol. 149.]

the complaint is insufficient in two respects, in that (a) it failed to allege the facts necessary to entitle the plaintiffs to show the contract between the city and the Carlin Construction Company and the amount earned thereunder; (b) it failed to allege that no other action had been brought to recover any part of the debt.

We are of the opinion that the stipulation entered into between the parties for the purposes of this trial effectually disposes of the first objection, which the appellants do not think it worth while to argue in their brief. We are equally persuaded that while it was necessary to a proper complaint, in an action to foreclose a mechanic's lien, to allege that no other action had been brought upon the debt, it was within the discretionary power of the court, under the provisions of section 723 of the Code of Civil Procedure, to amend the complaint by "inserting an allegation material to the case." It was held in *Riesgo v. Glengariffe Realty Co.* (116 App. Div. 414, 419; affd. without opinion *sub nom. Riesgo v. Clark*, 194 N. Y. 600) that such an allegation in an action to foreclose a mortgage was not a part of the plaintiff's cause of action which the plaintiff was bound to support by evidence upon a denial of knowledge or information sufficient to form a belief, but that it "seems to require the insertion of such an allegation in the complaint for the information of the court upon the trial, and not to raise an issue which by the mere denial of the allegation would require the plaintiff to prove the negative of an affirmative defense. It would seem to be analogous to those cases where a formal allegation is required in a complaint, but of which no proof is required upon the trial, like an allegation of a breach of a contract to pay a sum of money, where it is essential that the plaintiff should allege a breach of the contract of which he complains; but a denial of that allegation does not put the facts in issue." This being the purpose of the provision of the statute (Code Civ. Proc. §§ 1629, 3401; Lien Law [Consol. Laws, chap. 33; Laws of 1909, chap. 38], § 48) requiring the statement of this fact, and it not being a part of the plaintiff's cause of action, in the sense that it gives him a wrong to be remedied, it follows as a matter of course that where the defendant has failed to raise the objection by demurrer, the court will permit an amend-

App. Div.] Second Department, March, 1912.

ment upon the trial by permitting the insertion of an allegation material to the case. In such a case the power of the court is limited merely to the question of whether substantial justice is to be promoted by the amendment. (*Maders v. Whallon*, 74 Hun, 372, 376.) This conclusion is in entire harmony with the rule laid down by the court in *National Bank of Deposit v. Rogers* (166 N. Y. 380) and with the whole tenor of modern judicial determinations.

The judgment appealed from should be affirmed, with costs.

JENKS, P. J., BURR, THOMAS and CARR, JJ., concurred.

Judgment affirmed, with costs.

JOHN LEAP, Appellant, v. ASSOCIATED OPERATING COMPANY,
Respondent.

Second Department, March 29, 1912.

Dismissal — neglect to prosecute — purpose of dismissal.

Where a case was noticed by both parties and appeared upon the general Trial Term calendar in 1909, and a new calendar to include the causes remaining on the general calendar was made for the term commencing with the first Monday of October, 1911, and it is claimed that the plaintiff by neglect to file a new note of issue has failed to place one case upon the new calendar for a period of two months, during which time junior issues have been reached and disposed of, and the affidavit of the plaintiff's managing clerk, that he filed a note of issue for this case and for 150 others, for the purpose of having the case appear upon the October calendar, is not contradicted, a motion under section 822 of the Code of Civil Procedure to dismiss the plaintiff's complaint for want of due diligence in the prosecution of the same should be denied.

The fact that calendars are crowded and that it takes a long time to reach a case is not to be charged against a plaintiff; the question is not how long it has been since issue was joined but whether the plaintiff has unreasonably neglected to proceed.

The purpose of dismissing a complaint for unreasonable neglect to proceed is to prevent an unreasonable carrying of cases upon the calendar which are not designed to be tried.

APPEAL by the plaintiff, John Leap, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the

Second Department, March, 1912.

[Vol. 149.]

12th day of December, 1911, dismissing the complaint for failure to prosecute.

Henry M. Dater [*George F. Elliott* and *Jay S. Jones* with him on the brief], for the appellant.

Charles McG. Roberts [*Bertrand L. Pettigrew* with him on the brief], for the respondent.

WOODWARD, J.:

I am unwilling to hold that under the circumstances disclosed by the record now before us the discretion vested in the Supreme Court of the State of New York has been properly exercised in dismissing the plaintiff's complaint for want of due diligence in the prosecution of the same. Issue was joined on the 29th day of March, 1909, and if the order appealed from is sustained, the plaintiff, who alleges a good cause of action, is deprived of any opportunity of presenting his case, for the reason that the Statute of Limitations has run against the cause of action. The case was noticed by both parties for the May term of the Supreme Court for the year 1909, and appeared upon the General Trial Term calendar under the number 5842. By an order of the court a new calendar, to include the cases then on the general calendar untried, and not otherwise disposed of, was made up for the term commencing with the first Monday of October, 1911, and the failure of the plaintiff to have his case upon this calendar without effort to secure its position for a period of about two months, with the further fact that junior issues have been reached and disposed of, is the foundation for the order now before us on appeal.

The moving affidavit of defendant's attorney alleges that he has examined the calendar for the year 1911, and that the plaintiff's case is not on said calendar, and that "deponent has caused inquiry to be made by a clerk of his office, and said clerk informs him that the calendar clerk of this court told him that the reason why this case is not now upon the Trial Term calendar of this court is that no new note of issue was filed when the present calendar was made up, as required by the rules and practice of this Court." There is no affidavit of any clerk in the deponent's office that he made the inquiry or that

App. Div.] Second Department, March, 1912.

he was told this; simply the affidavit of the deponent that some unnamed clerk had told deponent that the calendar clerk had told him that the plaintiff had failed to file a note of issue. Edwin A. Williams, managing clerk in the office of plaintiff's attorney, in an affidavit opposing the motion, says that on or about "August, 1911, your deponent prepared and caused to be filed with the clerk of this court a note of issue for the purpose of having this case appear upon the new October calendar of this Court. That together with the filing of this note of issue there were some 150 other notes of issue. That deponent is absolutely certain that this case was filed with the others. That his records and his check marks on his whole calendar verifies (*sic*) that fact." There is no answering affidavit, and this positive statement of the managing clerk, under oath, that he filed the note of issue on time and for the purpose of having the case appear upon the October calendar, is not contradicted. The statement is not improbable, and no reason is suggested why the court should not accept the statement as being true. The plaintiff having taken the proper steps to have the case upon the calendar, there was no reason to assume that it would not appear, and the managing clerk swears that the first intimation he had that the case was not upon the calendar was when he came to check up his cases after the new calendar was printed, which may be assumed to have been at or near the time of the opening of the October term of court, and the defendant's moving papers are verified on the 29th day of November, 1911.

It may be conceded that a very diligent lawyer, with but a few cases on his hands, might have proceeded with greater diligence in an effort to get his case upon the calendar after the discovery that it was not there, but in view of the affidavit of the managing clerk that this note of issue was one of 150 filed with the calendar clerk, it hardly seems as though it was a proper exercise of the discretion given by section 822 of the Code of Civil Procedure to dismiss the complaint upon the failure of the plaintiff to act for a period of two months. Certainly there was no lack of diligence, assuming the truth of the affidavit of the managing clerk, up to the October term of court; every step necessary to preserve the plaintiff's rights had been

Second Department, March, 1912.

[Vol. 149.]

taken. Issue had been joined, the case had been noticed for trial and was upon the calendar. A new calendar was ordered made up, to contain the cases left over on the old calendar, and the plaintiff's attorney, through a managing clerk, had filed a note of issue. Nothing more could be done in the ordinary course of procedure until the calendar was issued and it became known that the case was not upon the calendar. No delay, no change of position on the part of the defendant is shown up to this time. No delinquency whatever is suggested up to the time of the publication of the calendar, and, conceding that a more diligent effort might have been made, was there such an unreasonable neglect to proceed as is contemplated by section 822 of the Code of Civil Procedure? I think not. Except for the statute there would be no limit to the time that a case might remain at issue, and the purpose of this provision was not to rob plaintiffs of their cause of action, but to prevent an unreasonable carrying of cases upon the calendar which were not designed to be tried. The fact that the calendars are crowded and that it takes a long time to reach a case is not to be charged against the plaintiff; the question is, not how long it has been since the issue was joined, but whether the plaintiff has unreasonably neglected to proceed. So far as the record shows the plaintiff had been proceeding as fast as possible from May, 1909. He had reason to believe he was all right up to October, 1911, and then, finding a calendar made up without his case (and it does not appear that it could have been so placed as to be reached at any time prior to the motion of the defendant, though junior issues may have been disposed of), he is deprived of all his rights because his attorney did not act within a period of two months. I do not think this was ever the intent of the Legislature.

The order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

JENKS, P. J., HIRSCHBERG and RICH, JJ., concurred; BURR, J., not voting.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

App. Div.] Second Department, March, 1912.

ALFRED E. F. MCCORRY and JOHN WELDEN, Respondents, v.
JOHN C. WIARDA & COMPANY, Appellant.

Second Department, March 29, 1912.

Principal and agent — broker's action for commissions — corporation — powers — authority of agents — notice.

The plaintiffs in an action against defendant, a corporation, alleged that they had entered into an agreement whereby the defendant agreed to pay them a commission of ten per cent on the transaction, provided they produced a purchaser for defendant's mill and quarry and the personal property connected therewith; that the plaintiffs had performed all of the conditions on their part, and that the defendant had refused to pay the commission. It was not alleged that the defendant was the owner of the property. It appeared upon the trial that the property in question belonged to the president of the corporation personally at the time of the making of the alleged contract, that this was known to the plaintiffs, and that the corporation was not organized to deal in real estate.

Held, that the plaintiffs failed to establish the cause of action alleged, and that, if they made any contract for commissions, they made it with the president of the corporation personally.

It is not within the apparent authority of a manufacturing corporation to sell its plant and machinery.

Thus, the president of such a corporation cannot bind it by an agreement made in behalf of a corporation with brokers to sell his individual property.

It can never be presumed that the agent of a corporation has authority to transact business not authorized by the charter of the corporation.

Persons dealing with corporations are bound to take notice of the limitations upon the powers of the agents of such corporations.

APPEAL by the defendant, John C. Wiarda & Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Queens on the 15th day of April, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of April, 1911, denying the defendant's motion for a new trial made upon the minutes.

Frederick N. Van Zandt [Joseph A. Burdeau and Edgar H. Hazelwood with him on the brief], for the appellant.

George A. Gregg [Morris L. Strauss with him on the brief], for the respondents.

Second Department, March, 1912.[Vol. 149.]

WOODWARD, J.:

The complaint in this action alleges that the defendant is a corporation organized and doing business under the laws of the State of New York, and that the plaintiffs are copartners, and that "on or about the 13th day of August, 1909, these plaintiffs and the defendant entered into an agreement whereby the defendant agreed to pay a commission of ten per cent to these plaintiffs on the gross sum of the transaction, provided these plaintiffs produced a purchaser for the mill and quarry at South Glastonbury, Connecticut, consisting of two pieces of real estate known as the Glastonbury Feld-Spar Mills, and the personal property connected with said business;" that the said commission of ten per cent was to be paid as a brokerage, and that "in accordance with said agreement plaintiffs produced a purchaser ready, willing and able to purchase said property at the sum of Twelve thousand (\$12,000) Dollars, which the defendant herein duly accepted, and said purchaser thereafter and on or about the 1st day of October, 1909, by the procurement of the plaintiffs, was ready, willing and able to enter into an agreement to purchase said property at said price, and duly entered into an agreement to purchase said property and did in fact purchase the same in the manner aforesaid at said price, and the defendant herein accepted said services so rendered by the plaintiffs;" that the plaintiffs performed all of the conditions on their part, and that the plaintiffs demanded ten per cent on \$12,000, and that the defendant has refused to pay any part thereof.

The answer, so far as any questions here involved are concerned, is a general denial of the material allegations of the complaint. The burden was, therefore, upon the plaintiffs to show that they had made a contract with the defendant corporation, which appears from the evidence to have been organized for the purpose of manufacturing, importing and exporting chemicals, minerals, clays, colors, electroplaters' materials, etc., for commissions as brokers in the sale of real estate in the State of Connecticut. It will be observed that the complaint does not allege that the defendant was the owner of this real estate; it merely alleges an employment on the part of this corporation engaged in the manufacture and

App. Div.] Second Department, March, 1912.

sale of chemicals, etc., to sell the "mill and quarry at South Glastonbury, Connecticut," and while one of the plaintiffs testifies that John C. Wiarda, the president and treasurer of the corporation, told him that the corporation owned the property, it was conceded by plaintiffs' counsel upon the trial that the property belonged to Mr. Wiarda personally at the time of the alleged contract, and this fact appears to have been known to the plaintiffs, for on the 10th day of August, 1909, three days before the making of the contract alleged in the complaint, McCorry went to look at the mill, and he testifies: "I made inquiries up there as to how long he had been in possession of that property; I asked Mr. Andress. He said Mr. Wiarda had had a partner there at one time, and the partner didn't do the right thing, and a foreclosure had followed, and Mr. Wiarda became the owner." With Mr. Wiarda concededly owning the property in question at the time of the alleged contract, and with this fact known to one of the plaintiffs, what reason could there be for the defendant corporation to be making a contract for brokerage? Mr. Wiarda, so far as the pleadings and proofs go, was a responsible business man, owning property in the State of Connecticut; he had no reason, so far as appears, for turning over his private business affairs to the corporation of which he was the president and treasurer, and the evidence ought to be very conclusive which would charge the corporation with his individual obligations. The corporation was not organized to deal in real estate, much less to become the agent of its own president in the hiring of brokers for the sale of his individual property. If Mr. Wiarda wanted to hire a broker he was certainly as competent to do this individually as he was to do so through the instrumentality of his corporation, acting through himself as the president thereof, and the cause of action pleaded is so improbable that nothing short of direct and convincing proof should be permitted to prevail. The alleged contract was made with Mr. Wiarda, and, as the contract related to a transaction entirely outside of the scope and purposes of the corporation, he could not bind the corporation simply because he was its executive officer. His authority to act for the corporation was

Second Department, March, 1912.

[Vol. 149.]

limited by the legitimate scope of its business as defined by its charter. It can never be presumed that the agent of such a corporation as is here shown to exist has authority to transact business which the corporation itself is not authorized by its charter to transact (*Leary v. Albany Brewing Company*, 77 App. Div. 6, 10, and authorities there cited), and persons dealing with a corporation are bound to take notice of the limitations upon the powers of their agents. (*Lord v. United States Transportation Co.*, 143 App. Div. 437, 451, and authorities there cited.) If Mr. Wiarda assumed to make a contract in behalf of his corporation to hire brokers to sell his individual property, he could not bind the corporation by such action, for it was not within the apparent scope of his authority as president of a company organized for the purpose of manufacturing and dealing in chemicals, etc. If Mr. Wiarda stated to the plaintiffs that the property belonged to the corporation (and this he denies), there would still be no ground for the plaintiffs to stand upon, for it is not within the apparent authority of a president of a manufacturing corporation to sell its plant and machinery, and it does not appear that the corporation or Mr. Wiarda had any other plant used in manufacturing any of the products in which it was authorized to deal. (*Lord v. United States Transportation Co.*, *supra*.) If the plant was a part of the manufacturing equipment of the defendant, it was not within the apparent scope of the authority of the president to sell the same, and if it was not then there could be no presumption that Mr. Wiarda was acting for the corporation in hiring a broker to sell the same.

It seems very clear to us that the plaintiffs, if they made any contract whatever, made it with Mr. Wiarda individually. Clearly the evidence in this case does not support the cause of action alleged in the complaint.

The judgment and order appealed from should be reversed.

JENKS, P. J., BURR, THOMAS and CARE, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

App. Div.] Second Department, March, 1912.

EGBERT D. SLOCUM, Respondent, *v.* THE SARATOGA AND WASHINGTON FIRE INSURANCE COMPANY OF SARATOGA AND WASHINGTON COUNTIES, Appellant.

Second Department, March 15, 1912.

Insurance — action on standard fire insurance policy — notice to company condition precedent — evidence — provision of policy as to notice to company construed — omission of venue from proof of loss.

In an action to recover for loss under a standard fire insurance policy a compliance with a provision of the policy requiring the insured to give immediate notice to the company of any loss and "within sixty days after the fire" to render a statement to the company as to the time and origin of the fire, etc., is a condition precedent to the maintenance of the action.

Evidence in such an action examined, and *held*, not to justify the jury in finding a sufficient compliance with the terms of the policy as to service of statement of time and origin of fire.

The phrase "within sixty days after the fire" as used in such a notice means within sixty days after the fire has terminated or abated to such an extent that an inspection of the damaged property may be had.

The omission of the venue from a proof of loss, sworn to before a commissioner of deeds, may be supplied by amendment.

HIRSCHBERG, J., dissented.

APPEAL by the defendant, The Saratoga and Washington Fire Insurance Company of Saratoga and Washington Counties, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Dutchess on the 13th day of June, 1911, upon the verdict of a jury, and also from an order entered in said clerk's office on the 27th day of June, 1911, denying the defendant's motion for a new trial made upon the minutes.

William Rooney, for the appellant.

James E. Carroll, for the respondent.

JENKS, P. J.:

The action is brought upon a fire insurance policy of the standard form, the plaintiff gained a verdict at Trial Term and

the defendant appeals. One of the defenses pleaded is that the plaintiff did not comply with a provision of the policy: "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, * * * and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire," etc.

A compliance herewith was a condition precedent to the maintenance of the action. (*Peabody v. Satterlee*, 166 N. Y. 174.) I think that the evidence did not justify the jury in finding such compliance and that, therefore, there should be a new trial. "Within sixty days after the fire" means "within sixty days after the fire has terminated or abated to such an extent that an inspection of the property damaged may be had." (*National Wall Paper Co. v. A. M. M. Fire Ins. Co.*, 175 N. Y. 226.) Explanatory of this interpretation, the court say, per HAIGHT, J.: "Until the fire abates, or is ended, his [i. e., the insured] access to the premises may be impossible, and in consequence he may be unable to learn the precise extent of his loss." The policy, termed the farm policy form, insured in divers sums a two-story shingle roof frame building, while occupied as a dwelling house, three barns and certain farm produce, feed and cattle, all situate on a farm in the town of Dover. The loss as reported by the plaintiff consisted of 400 bushels of oats, 17 tons of hay, 2 tons of rye straw, feed, and granary, hen and hog house, dwelling and barn, all totally destroyed, and barn No. 1 slightly damaged. The structures were of frame save there were metal or tin roofs upon them or some of them, and were situate in comparatively open country. I shall consider first the evidence as to what time after the fire the insured could have determined by inspection the precise extent of his loss. The plaintiff testifies on direct examination that the fire began about 7 P. M. on Friday, July 15, 1910, and that "we had a fire there burning four or five days after the original fire." Upon cross-examination he testifies that when the fire broke out he was a mile away, but went to the scene in a motor car; that when he reached there about half the building was burned; that he

App. Div.] Second Department, March, 1912.

stayed there all night; that he could not tell how long it was after he went there that the roof fell in; that he helped protect barn No. 1; that there was no water put on the building or the lean-tos, so far as he knew; that by midnight the building was all down — it had fallen; “the whole thing had gone down into a bunch of flames, a bunch of fire, right into the cellar,” and that he went home about 6 or 7 A. M. of the next day. He was then asked: “Q. You knew at that time, did you not, that the house was a total loss? A. At the time I left, sure. Q. You could see that from looking at it? A. Oh, yes, yes.” He further testifies that the hay and grain were on fire the evening of the 15th, that he saw them burning there and that he could not make any attempt to put it out — he could not get to it. “Q. You knew on the 16th that the hay would be a total loss, you did not expect to save it at all, the day after the fire? A. No, sir. Q. You knew that was a total loss? A. Yes, sir. Q. You could see that? A. Yes, sir. Q. Also the oats? A. The biggest part of them, of course as I told you we culled out a few bags, I think a week or two after * * *. Q. So that on the 16th day of July, 1910, you knew that you had suffered a total loss, did you not? A. I did, yes, sir.”

The plaintiff’s witness Hasbrouck on the direct examination testifies that the fire began on the evening of July 15, 1910; that he did not recall whether the building and contents were burning subsequent to that date; that on the next Sunday a large piece of oats was beginning to “go up,” as there was a little wind coming up; that it was coming up in a blaze; that it was burning about a week before they got it “all cleaned up” and the fire put out entirely; it was chiefly the oats and the planking under the floor; there was refuse that was burning in there that could not be reached, and “they got the whole thing torn up.” He put his hose on it Sunday. The fire broke out again during the following week; the fire was not put out until the latter part of the next week. On cross-examination he testifies that the roof fell in about one hour or an hour and a half after the fire began. He was asked: “Q. It was apparent, was it not, that the building was totally destroyed on the morning of the 16th of July, you could see that? A. Well, no, you mean the timbers and everything burned up? Q. No, the

building had lost its semblance as a residence? A. Sure. Q. All that was left was some blackened timbers in the basement? A. It was burning yet. Q. Just smouldering and smoking? A. The heavy timbers and those things had not all burned up. Q. They had not all burned up? A. Oh, no. Q. They did not burn up afterwards? A. Yes, they all burned up finally."

I think I have noticed all of the testimony bearing upon this issue save that it is to be noted that the plaintiff testifies that the hay, oats and rye straw burned were in barn No. 2 (of which the contents were not insured), and that if this was the fact he was not entitled to recover therefor in any event. The learned counsel for the respondent insists that this testimony was a manifest error on the part of the plaintiff, but I am not convinced as against the record as it reads.

I think, then, that the great preponderance of the evidence indicates that the plaintiff could have determined by inspection on the 16th day of July the extent of his loss. It indicates that the plaintiff could have seen that the buildings had lost their character as buildings, that they could not be thus designated, so that there was a total loss thereof within the rule of *Corbett v. Spring Garden Ins. Co.* (155 N. Y. 389), and that the personal property covered by the policy had been or at least would be totally destroyed. (*National Wall Paper Co. v. A. M. M. Fire Ins. Co., supra*, 228.) The fact that "a few bags" of oats were culled out finally did not indicate that the plaintiff could not on the 16th of July have determined the character and extent of the loss in that respect or suffice to change the character of a total to a partial loss. (*Singleton v. Boone County Home Mut. Ins. Co.*, 45 Mo. 250.)

Proofs of loss were mailed in the city of Poughkeepsie on September 14, 1910, and received by the defendant on Thursday, September 15, 1910. If the condition of the conflagration was such that on July 16, 1910, the plaintiff could have learned the extent of his loss, then it follows that the plaintiff did not comply with the provision inasmuch as the proofs were not received within the prescribed period of 60 days. (*Peabody v. Satterlee, supra*; *Fink v. Fink*, 171 N. Y. 616, 623.)

The proofs of loss were sworn to before a commissioner of deeds, Poughkeepsie, N. Y., but there was an absence of

App. Div.] Second Department, March, 1912.

venue. The omission is amendable in furtherance of justice. (Nichols N. Y. Pr. 508 and cases cited.)

The judgment and order are reversed and a new trial is granted, costs to abide the event.

BURR, WOODWARD and RICH, JJ., concurred; HIRSCHBERG, J., dissented.

Judgment and order reversed and new trial granted, costs to abide the event.

TICHNOR BROTHERS, INCORPORATED, Respondent, *v.* SAMUEL M. BARLEY, the Name "Samuel" Being Fictitious, etc., Appellant.

Second Department, March 15, 1912.

Appeal—reversal of judgment of Justice's Court—evidence—"impression" of witness.

A judgment of a Justice's Court should not be reversed on the sole ground that the justice of the peace refused to strike out testimony of the defendant as to his "impression" relating to the delivery of certain goods, where such "impression" was derived from the defendant's recollection of the facts.

If, however, an "impression" is merely an inference, or is not derived from a recollection of the facts and is so slight as to render it probable that it may have been derived from others, or may have been some unwarrantable deduction of the witness' own mind, it is not admissible in evidence.

APPEAL by the defendant, Samuel M. Barley, from a judgment of the County Court of Nassau county in favor of the plaintiff, entered in the office of the clerk of said county on the 28th day of June, 1911, pursuant to an order of said County Court entered in said clerk's office on the same day, reversing a judgment of a Justice's Court in favor of the defendant, and also (as stated in said notice of appeal) from the said order directing the entry of the judgment appealed from.

Albert H. Seabury, for the appellant.

Lincoln B. Haskin, for the respondent.

JENKS, P. J.:

The County Court reversed the judgment of the Justice's Court on questions of law. The learned judge wrote a commendable opinion (72 Misc. Rep. 638) upon the law of the case, but we think he erred when he excised all testimony as to a return of the goods. The opinion reads: "The justice erred in refusing to strike out" certain testimony of the plaintiff, "and as this testimony is the only evidence in the case given to establish the defense of rescission, the error is material," and also that "the only ground upon which the judgment could be sustained would be that there was an actual return of the goods which the justice was not authorized to find upon the said evidence."

The testimony as to actual return is as follows: The defendant, called by the plaintiff, testified upon cross-examination: "I received that letter and made copy at about the time goods were delivered. I returned goods to Express Co. with instructions to return [to] the manufacturers. Manufacturers address on goods when left at Express office. I don't remember if took receipt. I have none with me. Re-Direct Examination: I delivered them to Express Company wagon myself if my memory serves me correctly. I have a clerk. That is my impression. Q. Then your testimony that you delivered the goods to Express Company is based wholly on your impression? A. Yes." "Plaintiff moves that all his testimony regarding the delivery of the goods to the express company be stricken out because is immaterial, and because is based on an impression. [Motion denied. Exception.]"

The learned county judge seems of opinion that this "impression" was not evidence. An "impression" may be derived from the recollection of the witness as to the facts. Then "impression" is an expression in qualification of memory, and is admissible as evidence. Such qualification can but affect the probative force of the testimony, as can such limitations as "I think," or "I am not sure," or "To the best of my recollection," and the like. (See Moore Facts, § 1272, and cases cited.) If, on the other hand, an "impression" indicates that it is but an inference or that it "is not derived from recollection of the fact, and is so slight as to render it probable that it may have been derived from others, or may

App. Div.] Second Department, March, 1912.

have been some unwarrantable deduction of the witness's own mind, it will be rejected." (Greenl. Ev. [15th ed.] § 440; Wig. Ev. § 726 and cases cited; *Kingsbury v. Moses*, 45 N. H. 222; *Whitman v. Morey*, 63 id. 448; *Humphries v. Parker*, 52 Maine, 502.)

We think that the justice did not err in the ruling, and as this evidence was not disputed it was sufficient to support his judgment. The judgment of the County Court of Nassau county is reversed, with costs, and that of the Justice's Court is affirmed.

HIRSCHBERG, BURR, WOODWARD and RICH, JJ., concurred.

Judgment of the County Court of Nassau county reversed, with costs, and that of Justice's Court affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
LOUIS FRIEDMAN, Appellant.

Second Department, March 8, 1912.

Crime — burglary — grand larceny — evidence — possession of property as evidence of guilt — refusal of defendant to testify — declarations of persons made at time of their joint arrest.

One of three persons, indicted for burglary and grand larceny in taking two horses and some harness from a stable, was tried and found guilty. There was no direct proof connecting the defendant or the others with the crimes charged. It depended almost entirely upon the possession of the property and the circumstances thereof. Evidence examined, and held, insufficient to connect the defendant with the crimes charged.

The conscious, exclusive and recent possession of stolen property warrants an inference that the possessor is guilty of the crime by which such property was taken from its owner.

Such possession, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction.

The neglect or refusal of a defendant to testify does not create any presumption against him.

Declarations of one of three persons made at the time of their joint arrest are not admissible upon their trial as part of the *res gestae* in so far as they refer to past occurrences, nor are they admissible upon the theory of a conspiracy, unless such conspiracy be proven.

But such declarations, made in the presence of the accused, are admissible for the purpose of ascertaining his reply to them.

Second Department, March, 1912.

[Vol. 149.]

APPEAL by the defendant, Louis Friedman, from a judgment of the County Court of Queens county, rendered against the defendant on the 6th day of July, 1910, convicting him of the crimes of burglary in the third degree and grand larceny in the first degree, and also from an order entered in said clerk's office on the 25th day of May, 1911, denying the defendant's motion for a new trial made upon the minutes.

Eugene N. L. Young, for the appellant.

Matthew J. Smith, District Attorney, for the respondent.

JENKS, P. J.:

The defendant Friedman, Laskowitz and Markel were indicted for burglary and grand larceny. The defendant was tried separately and there was a general verdict of guilty. Two horses and some harness, the property of Stevenson, were taken from his stable in Long Island City, between midnight of February 3, 1910, and 5 A. M. of the next day. The said three men were arrested in company on February 10, 1910, at or near a railroad station in Paterson, N. J., the horses were found in a freight car nearby and the harness was found upon some premises in that city. After the arrest Laskowitz led the police officers to the said freight car. As there was no direct proof that connected Friedman or the others with the crimes charged, the evidence of the *corpus delicti* almost, if not altogether, depended upon the possession of the property and the circumstances thereof. The defendant was not a witness, but sought to establish an *alibi* and offered evidence which tended to show his good reputation, which evidence was not offset or overcome.

I think that there are errors which make against the affirmance of the judgment. A police detective testified that on February 9, 1910, he went to Centerville, N. Y., where the defendant and Laskowitz had a farm, found a gray mare in a stable on the farm, took the mare to a stable in Centerville, notified the chief of police of Paterson, and that as a result of the telegram, "there was a man by the name of M. Zeloff came to Centerville and brought the horse back to Jersey with him." It did not appear that there was the slightest relation

App. Div.] Second Department, March, 1912.

between this incident and the crimes charged in the indictment. I think that the admission of such testimony was against the rule discussed and stated in *People v. Molineux* (168 N. Y. 293 *et seq.*), that evidence of a distinct crime unconnected with that charged in the indictment is not admissible, and not within the exception thereto, that permits such evidence when "the transactions in respect to which evidence was given were all intimately connected in point of time, place and circumstance with that for which the accused was indicted, so that they formed a continuous series of transactions, each throwing light upon the other, upon the question of knowledge, intent and motive." (*Coleman v. People*, 58 N. Y. 555; *People v. Grossman*, 168 id. 47.)

The People offered the testimony of the agent of an express company in Paterson, N. J., that the defendant at 6 P. M. of February 9, 1910, at the Erie railroad station in that city, shipped a bag of harness to A. Cohen, Glen Cove, L. I. But Stevenson and one of the policemen had testified that on February 10th Stevenson found his harness in the premises of Fine in Paterson, N. J. There was no proof whatever that connected the harness thus shipped and the harness thereafter found, and it would seem that there could be no possible relation between Stevenson's harness found in Paterson on February 10th and harness shipped to Cohen, Glen Cove, on February 9th by express, for which a receipt and a way bill were given. But the assistant district attorney in his address to the jury said in part: "We show you that on the 9th day of February, at six o'clock in the evening, this defendant was in the express office at Paterson, New Jersey, and expressed a package of saddlery and harness to Glen Cove. Those things bear upon the fact as to whether this defendant did or did not take the horses, the fact that he had the harness in his possession, that he expressed the harness out on the island. They attempt to deny it. Again I am prevented—" Defendant's counsel: "Now—" The Court: "No." It rests with the People to show conclusively these errors were innoxious. (*Coleman v. People*, *supra*. See, too, *People v. Koerner*, 154 N. Y. 355; *Greene v. White*, 37 id. 405, 407; *People v. Corey*, 148 id. 476, 494.) I think that we should reverse the judgment under

our broad powers of review. (Code Crim. Proc. § 527; *People v. Sherlock*, 166 N. Y. 180, 183; *People v. Kathan*, 136 App. Div. 303, 311.)

The conscious, exclusive and recent possession of stolen property warrants an inference that the possessor was guilty of the crime by which that property was taken from its owner, for the reasons that experience so indicates and that generally the possessor knows exclusively the events which brought possession in him. (*Griffen v. Manice*, 166 N. Y. 194.) Such possession raises a presumption of fact. (*Stover v. People*, 56 N. Y. 315.) It should be noted that the possession must be exclusive (*Knickerbocker v. People*, 43 N. Y. 177; *People v. Wilson*, 151 id. 403) and "recent," although "recent" is a relative term dependent on the surrounding circumstances, including the character of the property, of each case, and not susceptible of precise definition. (*State v. Hodge*, 50 N. H. 510-516; Whart. Cr. Ev. § 759; "Recent," in Words and Phrases Judicially Defined; 3 Rice Ev. 733.) And such possession, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction of the possessor of the crime by which it is proved the property was taken. (*Knickerbocker v. People*, *supra*; *Stover v. People*, *supra*; *People v. Wilson*, *supra*.) In *Knickerbocker v. People* (*supra*) the court cites with approval the language of LITTLEDALE, J., in *Rex v. Smith* (1 Ry. & Mood. 295), proof "of possession of stolen property soon after a robbery refers to the original taking with all its circumstances." If the explanation as to possession create a reasonable doubt in favor of the possessor it would practically rebut the presumption of guilt arising from the mere possession. (*Dame v. Coffman*, 58 Ind. 340; 3 Rice Ev. 734.)

But the mere proof of such possession, unexplained to the satisfaction of the jury, would not justify the jury in finding that the possessor was guilty of the crime of burglary, for example, if that were the crime whereby the property was originally taken, if the evidence disclosed to the satisfaction of the jury that the possessor was only a receiver of stolen goods. GRAY, J., writing for the court in *People v. Wilson* (*supra*), says: "If the evidence satisfies the jury that the larceny was committed by some other person than the defendant and that

App. Div.] Second Department, March, 1912.

some part of the stolen property was found in the defendant's conscious and exclusive possession, they might convict him of the crime of receiving stolen goods and acquit him of the crime of larceny." Russell on Crimes (Vol. 2, p. 1482) says: "The possession of property that has been recently stolen is evidence either that the person in possession stole the property, or that he received it knowing it to be stolen according to the other circumstances of the case. So where the prisoner was found in the possession of some sheep that had been recently stolen, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself and he was convicted of receiving it was held upon a case reserved that there was evidence for the jury that he received them knowing them to have been stolen." And the same author cites the language of BLACKBURN, J., in *R. v. Langmead* (L. & C. 427): "When it has been shown that property has been stolen and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest and that he was either the thief or the receiver according to the circumstances. If he had been seen near the place where the property was kept before it was stolen they may fairly infer that he was the thief. If other circumstances show that it is more probable that he was not the thief, the presumption would be that he was the receiver. The jury should not convict the prisoner of receiving unless they are satisfied that he is not the actual thief." In the case at bar, if the jury were convinced that the proof showed that the defendant was *only* a receiver of stolen goods they should not upon mere proof of his possession, conscious, exclusive, recent and unexplained as to its innocence, have found a verdict of guilty. For the indictment charges burglary and larceny only, although a count for the receiving of stolen goods could have been included therein. (*People v. Wilson, supra.*) Of course the jury could have rejected the testimony as to the way whereby the defendant came into possession and have rested their general verdict of guilty upon the possession provided they were satisfied by the proof that the property had been taken from the owner by a

Second Department, March, 1912.

[Vol. 149.]

burglary or a larceny. So far as the presumption that rests upon possession is supported by the defendant's "proved or presumed ability" of explanation, "it must, if he refuses to testify, rest upon his proved or presumed ability to explain his possession by other evidence than his own testimony." (*State v. Hodge, supra*, 517.) To urge that his omission to take the witness stand must make against him so far as the lack of explanation is concerned is to offend the statute. (Code Crim. Proc. § 393.)

The declarations of Laskowitz at the time of the joint arrest were not admissible as of the *res gestae* in so far as they referred to past occurrences, nor were they admissible upon the theory of a conspiracy unless evidence had been or was thereafter produced tending to establish such concerted action for the commission of the crimes charged in the indictment. Such declarations as bore upon the question of a reply by the defendant were admissible, not, however, as evidence, but only for that purpose. (*People v. Kennedy*, 164 N. Y. 449.)

The judgment of conviction is reversed and a new trial is ordered.

BURR, THOMAS, CARR and WOODWARD, JJ., concurred.

Judgment of conviction of the County Court of Queens county and order reversed and new trial ordered.

RIDGE OF BROOKLYN REALTY COMPANY, Respondent, *v.* JOHN OFFERMAN and Others, Appellants, Impleaded with KINGSTON REALTY COMPANY and Others, Defendants.

Second Department, March 8, 1912.

Mortgage — conveyance of part of mortgaged lands — release of remaining lands from lien of mortgage — equity — when rule as to marshaling assets inequitable.

Where a mortgagor conveys part of the mortgaged premises covenanting that it is free from incumbrances there is an implied agreement that the remaining portion shall be devoted to the payment of the mortgage. If the mortgagee, knowing the facts, releases the remaining land there is a discharge of the mortgage to the extent of the value of the land released.

App. Div.] Second Department, March, 1912.

But this equitable rule of marshaling assets is not applied if it will injure the mortgagee.

R., owning two lots covered by a single mortgage, exchanged one of them for lands owned by K., both parties covenanting that the lands were to be free from incumbrances. R. refused to release a mortgage on the lot conveyed owing to the fact that the lands conveyed by K. were covered by a mortgage which was not released. Subsequently K. became insolvent and its real estate subject to the lien of judgments. R. conveyed the remaining lot owned by it to C. and the mortgagee assigned the mortgage thereon to the plaintiff while the grantee procured a release of the mortgage on the lands conveyed by K. to R., whereupon the plaintiff released the mortgage on the lot conveyed to C. In a suit by the plaintiff to foreclose the mortgage on the lot conveyed, on which the creditors of K. had acquired liens by the entry of judgments,
Held, that under the circumstances it would be inequitable to apply the doctrine aforesaid and that the plaintiff was entitled to a foreclosure sale as against the judgment creditors of K.

APPEAL by the defendants, John Offerman and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 24th day of May, 1910, upon the decision of the court, rendered after a trial at the Kings County Special Term, directing a sale in foreclosure.

Norman C. Conklin [William H. Hamilton with him on the brief], for the appellants.

George W. Harper, Jr. [Theron A. Clements with him on the brief], for the respondent.

Judgment affirmed, with costs, on the opinion of Mr. Justice BLACKMAR at Special Term.

HIRSCHBERG, THOMAS, CARR, WOODWARD and RICH, JJ., concurred.

The following is the opinion delivered at Special Term:

BLACKMAR, J.:

On May 31, 1905, the mortgage in question was made by the Frederick W. Rowe Company, Incorporated, hereinafter called the Rowe Company, to Elijah T. Rowe, John H. Rowe and Frederick W. Rowe. Its amount was \$3,800 and it was due in one year. The mortgage covered two gore-shaped parcels of real property both on Kingston avenue but on different sides of

Carroll street. For convenience we will call the one on the north side of Carroll street, which this action was brought to foreclose, parcel No. 1, and the one on the south side of Carroll street parcel No. 2. On November 8, 1906, the Rowe Company conveyed parcel No. 1 to the Kingston Realty Company by a deed containing a covenant that it was free from incumbrances, and at the same time the Kingston Realty Company conveyed other parcels to the Rowe Company by a deed containing a covenant that they were free from incumbrances. The transaction was an exchange in which no consideration but the mutual conveyance passed, and both parcels were to be and were in terms conveyed free and clear. The Rowe Company arranged for a release from the holders of the mortgage in question, and but for the absence of one of the parties would have delivered it at the time of passing title. When it transpired, however, that the parcel conveyed by the Kingston Company was subject in part to a mortgage for \$19,000 covering also other property, the Rowe Company refused to deliver the release.

In April, 1907, the defendant John Offerman obtained a judgment against the Kingston Realty Company for \$5,151.54, which was docketed and became a lien on parcel No. 1 on September 27, 1907. The defendants John Offerman, Lena M. Rasch and Anna C. Schmidt also obtained a judgment against the Kingston Realty Company, which was docketed and became a lien on parcel No. 1 on November 18, 1907. The Kingston Realty Company was insolvent on September 27, 1907, and on that day was adjudicated a bankrupt, although the adjudication was reversed on appeal on the ground that it was not a trading company.

Subsequently, pursuant to an arrangement made between the Rowe Company, the mortgagees, the plaintiff, and one William F. Collins its president, the Rowe Company conveyed parcel No. 2 to Collins by a deed stating that it was subject to the mortgage, and the mortgagees assigned the mortgagor to the plaintiff. Collins, for the plaintiff, paid to F. W. one of the mortgagees, the sum of \$3,800 and procurer the release of the land deeded by the Kingston Realty Company to the Rowe Company from the lien of the \$19,000 blanket.

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App. Div.] Second Department, March, 1912.

gage. The plaintiff immediately thereafter released parcel No. 2 from the lien of the mortgage in question, leaving it a lien only on parcel No. 1, the title of which was in the Kingston Realty Company, and which was also incumbered by the said judgments of the defendants Offerman, Rasch and Schmidt.

On June 23, 1909, the plaintiff began the foreclosure of this mortgage against parcel No. 1, making the judgment creditors of the Kingston Realty Company parties defendant. The judgment creditors answered, claiming that on the conveyance of parcel No. 1 to the Kingston Realty Company parcel No. 2 became primarily chargeable with the payment of the mortgage, and that the release of parcel No. 2 by the act of the mortgagee with the knowledge of the facts operated as a discharge of parcel No. 1 from the lien of the mortgage.

It may be stated as a general rule that where a mortgagor conveys a part of the mortgaged premises covenanting that it is free from incumbrances, it is equivalent to an agreement that the remaining portion shall be devoted to the payment of the mortgage, and the mortgagee having knowledge of this situation is bound to respect it. In such a case the land should be sold to satisfy the mortgage in the inverse order of alienation. If the mortgagee, knowing the facts, releases the remaining land it is equivalent to the discharge of the mortgage to the extent of the value of the land so released. This rule is a branch of the equitable doctrine of marshaling assets. The object of the rule is to preserve the relative rights of the grantor and grantee of the land; and it is never applied except in situations where its enforcement will not injure the mortgagee. Generally it is a matter of indifference to the mortgagee as to which portion of the security he will first resort; the rule of law, therefore, requires him so to proceed as to preserve the rights of the different parties who have interests in the security subject to his mortgage. The rule is not an arbitrary one, and is never enforced except in the interest of justice and equity. The enforcement of the rule is never permitted to interfere with the legal rights of the mortgagee, but at the most it controls the method or order in which his rights may be enforced and forbids him to wantonly disregard the equitable rights of others of which he has knowledge.

In this case the Rowe Company, the mortgagor, conveyed a portion of the land to the Kingston Realty Company by a deed containing a covenant against incumbrances; the mortgagee and his assignee, the plaintiff, knew the facts, and yet the assignee for a nominal consideration released the remaining land covered by the mortgage. These facts call for the application of this doctrine unless other facts exist which make it inequitable to apply it. I think such facts do exist.

The Rowe Company and the Kingston Realty Company agreed to exchange gores of land, each to convey free and clear from all incumbrances. Both parcels were incumbered, the Rowe property by the mortgage in question and the Kingston Realty property by a blanket mortgage for \$19,000, covering also other property. The deeds, both containing covenants against incumbrances, were mutually delivered, but the respective mortgages were neither released nor discharged. The Rowe Company had secured a release from the mortgagees for delivery pursuant to the contract, but, finding that the premises conveyed to them were incumbered, refused to deliver it. The situation then was that each of the parties was liable to the other for a breach of the covenants against incumbrances. Each party had a right of action against the other, and each party had a defense or counterclaim growing out of the same transaction. In this situation the Kingston Realty Company became insolvent. If the application of this doctrine would result in enforcing the Rowe Company's covenant against incumbrances, leaving them with a barren claim against an insolvent corporation, it would be unjust. This is exactly what it would do. Assuming, without deciding, that the judgment creditors have the same right to invoke the doctrine that the Kingston Realty Company has, yet they certainly have no greater right. The basis of the right to invoke the doctrine is that the Rowe Company conveyed the land covenanting that it was free and clear. The effect of applying the doctrine is to specifically enforce this covenant, for it throws the burden of the mortgage on the other parcel. But the Rowe Company had a defense against this cause of action or at least a counter-claim growing out of the breach by the Kingston Realty Company of its covenant that the land conveyed by it to the Rowe

App. Div.] Second Department, March, 1912.

Company was free and clear. Would any court compel the Rowe Company to specifically perform its portion of the agreement of exchange by clearing the mortgage from the parcel which it was to convey without also requiring the other party to the contract to perform its obligation? I think not. No more will the court do this indirectly by the application of a rule never invoked except to secure justice and to preserve equitable rights. If the assignee of the mortgage is chargeable with knowledge of those facts which taken separately would require the application of the rule, it also knew the other facts which rendered the rule inapplicable. It, therefore, violated no rule of law or equity when it did what it pleased with its own security.

To go a little further into the facts, it appears that the Rowe Company practically conveyed parcel No. 2 to Collins as the consideration for the release from the mortgage of the land which the Kingston Realty Company had agreed to convey free and clear. The effect of declining to apply this doctrine is to throw upon the land of the Kingston Realty Company or its successors, these defendants, judgment creditors, the just burden of clearing from the \$19,000 mortgage the land which the Kingston Realty Company agreed to convey free and clear.

Judgment for the plaintiff, with costs and an allowance of two and one-half per cent. Let the plaintiff present finding in accordance with this opinion.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H.
SEAMAN, Relator, *v.* JAMES H. COCKS and Others, Constitut-
ing the Board of Supervisors of the County of Nassau,
State of New York, Respondents.

Second Department, March 29, 1912.

Municipal corporation — certiorari to review proceedings of board of supervisors in removing county superintendent of highways from office — Highway Law construed — plans and specifications for town highways — malfeasance defined.

Certiorari to review the proceedings of a board of supervisors in removing a county superintendent of highways, pursuant to section 30 of the Highway Law, for malfeasance in office by reason of the receipt by him

Second Department, March, 1912.

[Vol. 149.]

of moneys from a town for the preparation of plans and specifications for the improvement of a highway. Evidence examined, and *held*, that, although the county superintendent may have misconceived his rights, he should be reinstated.

Malfeasance is the doing of an act which is positively unlawful or wrongful, and in order to justify the removal of a county superintendent of highways must affect his performance as such officer. Thus, a misconception of his rights affords no ground for a conclusion of malfeasance. It seems, that he may not voluntarily perform such services and thereby create a charge against the town.

No absolute duty rests upon the county superintendent of highways to prepare and furnish plans, specifications and estimates for the repair and improvement of strictly town highways, but he may in a proper case decline to do so and call upon the highway commissioner to provide the same.

CERTIORARI issued out of the Supreme Court and attested on the 11th day of September, 1911, directed to James H. Cocks and others, constituting the board of supervisors of the county of Nassau, State of New York, commanding them to certify and return to the office of the clerk of the county of Nassau all and singular their proceedings had in removing the relator from office.

M. Linn Bruce [*John J. Graham* with him on the brief], for the relator.

Harry W. Moore [*Edward J. Deasy* with him on the brief], for the respondents.

PER CURIAM:

The relator was found guilty of charges and removed by the board of supervisors of the county of Nassau from his office as county superintendent of highways of that county, pursuant to section 30 of the Highway Law (Consol. Laws, chap. 25 [Laws of 1909, chap. 30], as amd. by Laws of 1910, chap. 567), for malfeasance in office by reason of the receipt of certain moneys from the town of North Hempstead in said county. That town adopted a proposition to macadamize an avenue in the town, and thereupon the relator, a civil engineer by profession, was employed and was retained at the instance and request of the town superintendent of highways to prepare plans and specifications for the improvement. He did so and his work

App. Div.]

Second Department, March, 1912.

was accepted. He presented a bill therefor, made out to him personally, which was approved by the town superintendent and paid by order of the town board. This action was the sole ground of removal.

We find nothing in the Highway Law which in terms prohibits the county superintendent from practice of his profession as a civil engineer, or which in terms prohibits the person who is the occupant of that office from doing such work personally for the town. The learned counsel for the respondents calls attention to certain provisions of section 33 of the Highway Law, which prescribes the general powers and duties of such officer, which provide that he shall have general supervision of the work of constructing, improving and repairing bridges and town highways in his district or county, and that he shall approve the plans, specifications and estimates for the construction and maintenance of town highways. And he also points out section 48, which provides that the contracts for town highways shall be awarded by the town superintendent in accordance with estimates, plans and specifications to be furnished by the district or county superintendent or by the commission as provided in this chapter, which in turn refers to the provision of subdivision 5 of section 15, that reads: "Cause plans, specifications and estimates to be prepared for the repair and improvement of highways and the construction and repair of bridges when requested so to do by a district, county or town superintendent." We agree with the learned Attorney-General of the State, whose opinion is returned with the record, in his conclusion as follows: "Construing the statute as a whole, I am of the opinion that no absolute duty rests upon the county superintendent to prepare and furnish plans, specifications and estimates for the repair and improvement of strictly town highways, but that the statute contemplates that he may in a proper case decline to do so and call upon the Highway Commission to provide the same. Inasmuch as the means is afforded by the statute for procuring such plans, specifications and estimates without expense to the town, it would seem to be quite clear that he may not voluntarily perform such services and thereby create a charge against the town." But if the relator could not legally present a claim

Second Department, March, 1912.

[Vol. 149.]

against the town for such work done under retainer or voluntarily, such action would be wrongful to the town only.

The malfeasance that justifies this removal must be such as affects his performance as county superintendent. The officer must be separated from the man. (See Mech. Pub. Off. § 457.) The removal rests specifically upon the naked act. It is not asserted that in any way the relator used or abused his office as county superintendent in this work that was done. On the contrary, he asserted before the board, without contradiction or demur, that the bills were for expenses actually paid out by him for his personal employees—engineers, draftsmen, office force; that the entire engineering work was honestly done by that office force, and that the bills rendered did not include any of his personal service as county superintendent.

Suppose that the law should be construed to require the county superintendent to provide such plans and specifications. There is no suggestion that he had any county or town employee under his control whose duty it was to do the work. It would follow, then, that either the county superintendent must himself do it all or might employ such outside force as would be required for that purpose. It would seem almost absurd to conclude that an officer charged with so many and multifarious duties in connection with improvements throughout the county must exclusively perform such work in every detail thereof by his individual labor—not to speak of the remuneration of \$1,800 a year.. If, on the other hand, the law should be construed to permit the employment of assistants, then for aught that appears the relator has done no more than this, and the fact that he personally presented a bill therefor to the town authorities would hardly be a malfeasance in his county office.

But there is a further consideration. Malfeasance is the doing of an act which is “positively unlawful or wrongful” (Cent. Dict.), which one ought not to do at all. (*Bell v. Josselyn*, 9 Gray, 307.) It is an act wholly wrongful and unlawful (*Coite v. Lynes*, 33 Conn. 109), and in *Stokes v. Stokes* (23 App. Div. 558) it is said that a misconception of one’s rights affords no ground for a conclusion of malfeasance. We think that upon the record the evidence indicates that the relator at worst but

App. Div.] Second Department, March, 1912.

misconceived his rights, in that he supposed that there was no legal objection to his rendition of this account for such work.

The writ should be sustained, the proceeding annulled and the relator should be reinstated, but without costs.

JENKS, P. J., HIRSCHBERG, BURR, WOODWARD and RICH, JJ., concurred.

Determination annulled and relator reinstated, without costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.
PETER H. VON KAMPEN, Appellant.

Second Department, March 29, 1912.

Public health — furnishing of coloring matter with purchase of oleomargarine — “coloring matter” defined — constitutional law — police power.

A grocer, who, upon the sale of a quantity of oleomargarine, furnishes the purchaser with a capsule containing coloring matter, violates section 41 of the Agricultural Law, providing that “No person selling any oleaginous substance not made from pure milk or cream of the same as a substitute for butter shall sell, give away or deliver with such substance any coloring matter.”

The words “coloring matter,” as used in the statute, mean coloring matter which may give the oleomargarine the appearance of butter.

The statute is a valid exercise of the police power.

THOMAS and WOODWARD, JJ., dissented, with opinion.

APPEAL by the defendant, Peter H. Von Kampen, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, rendered on the 10th day of December, 1910, after trial before the court without a jury.

William C. Breed [Henry H. Abbott and Sumner Ford with him on the brief], for the appellant.

Charles M. Stern, Deputy Attorney-General [Valentine Taylor with him on the brief], for the respondent.

JENKS, P. J.:

An agent of the Agricultural Department went to the grocer’s shop of the defendant and asked the defendant if he

Second Department, March, 1912.

[Vol. 149.]

sold oleomargarine. The defendant said that he did, whereupon the agent asked him whether he gave coloring matter with it and he said that he did. Thereupon the agent bought and received a pound of oleomargarine and the defendant at the same time handed to him a capsule which contained coloring matter. It was conceded that "coloring matter can be purchased very generally at druggists', groceries and other establishments as a commodity by itself, such as is used for coloring butter or oleomargarine." The Municipal Court found the defendant guilty of a violation of section 41 of the Agricultural Law (Consol. Laws, chap. 1 [Laws of 1909, chap. 9], as amd. by Laws of 1909, chap. 357) and imposed a fine.

This appeal attacks the constitutionality of the said statute. The part thereof which is germane to this case reads: "No person selling any oleaginous substance not made from pure milk or cream of the same as a substitute for butter shall sell, give away or deliver with such substance any coloring matter." The statutes of this State prohibit the manufacture or sale of any article compounded so as to imitate butter, and such legislation has been upheld as preventive of fraud or deception upon purchasers or consumers. (*People v. Arensberg*, 105 N. Y. 123; *McCray v. United States*, 195 U. S. 27, 64; *People v. Biesecker*, 169 N. Y. 53, 56. See, too, as to the principle, *People v. Girard*, 145 N. Y. 105.) Section 39 of the same act provides in part: "No person shall coat, powder or color with annatto or any coloring matter whatever, butterine or oleomargarine or any compound of the same or any product or manufacture made in whole or in part from animal fats * * * by means of which such product, manufacture or compound shall resemble butter or cheese, the product of the dairy; nor shall he have the same in his possession with intent to sell the same nor shall he sell or offer to sell the same." Reference to the context of this very section 41 indicates that the "coloring matter" referred to is such as may be used for the artificial coloring of oleomargarine. For immediately preceding this prohibition is a provision against the addition to the substance or combination therewith of "any annatto or compounds of the same, or any other substance or substances whatever, for the purpose or with the effect of imparting thereto a color resem-

App. Div.] Second Department, March, 1912.

bling yellow, or any shade of yellow butter or cheese, nor introduce any such coloring matter or other substance into any of the articles of which the same is composed." The words "coloring matter," which are of course generic and as such could be applicable to all substances which may change or afford color, are to be interpreted as meaning coloring matter which may give the oleomargarine or like substance the appearance of butter or cheese. (See Endl. Interp. Stat. §§ 400, 403; Suth. Stat. Const. §§ 268, 269; *People v. Richards*, 108 N. Y. 137; *Burks v. Bosso*, 180 id. 341.) Thus we may read this legislative prohibition as aimed at such coloring matter as may, when added to oleomargarine or like substance or combined therewith, give it the appearance of butter or of cheese. If the furnishing of such coloring matter with the purchase of oleomargarine may facilitate a compound so that it imitates butter, then I think that the statute may be sustained, as, to quote the language of CULLEN, J., in *People v. Biesecker (supra)*, "legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use and thus imposing upon consumers or purchasers." If the purchaser thus can obtain such coloring matter, not only may he be aided to a course of deception by the convenience of one transaction, but he also is furnished with such matter adapted for the very purpose of imitation and presumably in its effective form and proper quantity. With the means thus furnished all that apparently would remain would be the act of addition or compounding. Thus the means of fraud or deception, of which means he may be ignorant, are put in his hand simultaneously with the sale of the subject-matter of such wrongdoing and incident to it. Not only is opportunity offered, but it may well be that the doing of the forbidden act itself is urged in that it may be so readily done. It is said that the prohibition is in restraint of trade. Rather is it in regulation, in the exercise of the police power, of the sale of a certain thing in the way of prevention of an unlawful use thereof. If one desires to purchase the commodity itself, as an independent transaction, he may do so freely anywhere and at any time save as restricted by this statute. Such regulation is for the Legislature, and the terms

thereof are within its police power unless they "are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law." (*Gundling v. Chicago*, 177 U. S. 183, 188.) The assertion that such a regulation interferes with vested rights is tantamount to saying that, although the manufacture or sale of artificially colored oleomargarine is unlawful, yet the purchaser of oleomargarine has a vested right not to be hampered in the means of working a violation of the law. (See *People v. Girard, supra.*)

It may well be that the purchaser of oleomargarine is hindered to an extent from obtaining coloring matter with which to color oleomargarine for sentimental or other reasons which is intended for his own consumption, but the probabilities are that one who would thus purchase both the oleomargarine and the coloring ingredient has in view some subsequent purchaser from him or some consumer other than himself, and that he seeks the means of compound to work fraud or deception upon some other. The question of intent is not involved in this statute. (*People v. West*, 106 N. Y. 293; *People v. Bowen*, 182 id. 1.) In justice to the defendant I may add that there is no proof of concealment or evasion in the sale and the supply of the coloring matter, and that the defendant did not deny his acts.

The judgment should be affirmed.

BURR and CARR, JJ., concurred; THOMAS, J., read for reversal, with whom WOODWARD, J., concurred.

THOMAS, J. (dissenting):

The defendant has been convicted for selling at one time a pound of oleomargarine as such, and upon request furnishing therewith a package of harmless coloring matter, which two things, if blended later, as doubtless intended, would tend to give the former the appearance of butter. There is no evidence that either article was unhealthful, that there was any deception on the sale thereof, or that there was any intention on the part of the vendor or purchaser that the same would or could be used to deceive any person or that the blended arti-

App. Div.] Second Department, March, 1912.

cles would be imposed upon any person as butter. The statute does not forbid a separate sale of the articles, but attempts to forbid a simultaneous sale of the two articles so that they are included in one transaction. The statute in question is section 41 of the Agricultural Law as amended by chapter 357 of the Laws of 1909, which, among other things, provides: "And no person selling any oleaginous substance not made from pure milk or cream of the same as a substitute for butter shall sell, give away or deliver with such substance any coloring matter." The defendant urges that this prohibition is contrary to article 1, sections 1 and 6, of the Constitution of the State of New York, and to the Fourteenth Amendment to the Federal Constitution. This general subject has during the last thirty years been so repeatedly matter of consideration and decision by the courts in this State that no original thought can be added to the discussion. Liberty to contract, to hold and to sell property, to follow lawful occupations, as protected by constitutional guaranties, has been repeatedly asserted, and the same has been subordinated, to a degree, only to the real necessities of protecting the public welfare, in such respect as health and fraudulent practices. The present effort should be to find the scope of the decisions and ascertain whether they denounce the statute in question. The sale of wholesome oleomargarine, without deception, may be regulated but not prohibited (*People v. Marx*, 99 N. Y. 377), but the sale of the article so artificially colored as to resemble butter may be prohibited, inasmuch as it in such combination presents opportunities for deception that in the view of the Legislature could be prevented only by the prohibition. (*People v. Arensberg*, 105 N. Y. 123.) A similar act for the protection in the sale of cider vinegar is valid. (*People v. Girard*, 145 N. Y. 105.) Therefore, the law is that the defendant may not be forbidden to make separate sale of the oleomargarine and a distinctly separate sale of the coloring matter. But the prohibition is that when the oleomargarine is sold there shall not be coincidentally an accompanying gift of the coloring matter. This in effect is a direction that the two articles shall not be made the subjects of one and the same sale. I find no explanation of the purpose of this prohibition, except the suggestion that it

aids the general purpose, to prevent deception in **the sale** and use of oleomargarine. But in what way it will **so operate** is not stated, and it is certainly beyond conception. **There is no** purpose in the law to prevent a consumer blending **the two substances** for his own personal consumption or for **that of his family**. It is true that oleomargarine and the **coloring matter** cannot be blended for intended sale, nor can it be **used in such form** in hotels, restaurants and other places of public **entertainment** under section 40 of the Agricultural Law. The **prohibition** in question does not facilitate the unlawful manufacture, sale or use in the public places indicated of oleomargarine, **nor** does it tend to deter such manufacture and sale. **What it does do** is to compel storekeepers to sell oleomargarine for **private consumption** at one instant, and coloring matter at **another**. This is an impairment of the liberty to sell property, a **valuable quality** of ownership, by attaching a restriction that **has no relation** to any forbidden or injurious act. It may be argued that the restriction is trifling; that it inconveniences **in small degree** as it merely dissociates the disposition of **two**. But little property rights are entitled to zealous protection. If the present law is valid, it would be equally so to prohibit the sale of flour with a cake of yeast; of articles that the housewife would combine in the various articles of food for her household. The provision is one of those petty annoyances of overzealous and indiscreet men, losing sight of the **real means** of protecting commerce, cause to be enacted reluctantly. There may be a minimum aggression in this, but an excess of legislative power which should be checked it appears.

The judgment should be reversed.

WOODWARD, J., concurred.

Judgment of the Municipal Court affirmed.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent, v. THE VILLAGE OF PORT CHESTER, Appellant.

Second Department, March 29, 1912.

Railroad — taxation of right of way for improvement of streets passing thereunder — statute — repeal by implication — constitutional law — equity:

A railroad company, whose right of way crosses the streets of a village by means of bridges and abutments, is not liable to assessment for the improvement of the village streets as no special benefits inure to its right of way from such improvements.

The provision of the statute (Laws of 1899, chap. 517) under which such improvements were made, that "No abutting or adjoining property shall be exempt from assessment under this act," does not repeal by implication the provision of the Railroad Law (Laws of 1890, chap. 565, § 64) that a highway passing under a railroad shall be maintained and kept in repair by the municipality in which the highway is situated.

Repeals by implication are not favored and will not be presumed unless there is an irreconcilable inconsistency between the two statutes.

Quare, as to the constitutionality of Laws of 1899, chapter 517, providing that no abutting or adjoining property shall be exempt from taxation for street improvements.

A court of equity has jurisdiction to reduce, vacate or enjoin the enforcement of an assessment upon abutting property for street improvements.

APPEAL by the defendant, The Village of Port Chester, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 2d day of March, 1911, upon the decision of the court rendered after a trial at the Westchester Special Term.

William A. Davidson, Corporation Counsel, for the appellant.

Charles M. Sheafe, Jr. [William L. Barnett with him on the brief], for the respondent.

HIRSCHBERG, J.:

The trustees of the appellant, The Village of Port Chester, pursuant to chapter 517 of the Laws of 1899 and the acts amendatory thereto, have levied an assessment for grading,

Second Department, March, 1912.

[Vol. 149.]

paving and improving Willett avenue and Highland street in said village against the property abutting on said streets, according to the front-foot rule. Those streets are parallel, running north and south under the right of way used by the plaintiff for its steam railroad, which right of way crosses them by means of bridges and abutments. Contiguous to its right of way the respondent owns two small parcels of real estate occupied by buildings and abutting on those streets. The judgment appealed from vacates and enjoins the enforcement of the assessment levied against the respondent's right of way, and reduces the assessment against said small parcels of real estate. The controversy before us relates principally to the right of the trustees to levy the assessment against the appellant's right of way. The portion of the judgment reducing the assessments against the property contiguous to the right of way does not appear to be questioned, except as the appellant questions the jurisdiction of the court to grant relief in equity.

The respondent contends that as no special benefits inure to its right of way from the street improvements, the assessment operates as a taking of its property without due process of law, contrary to the doctrine established by the Supreme Court of the United States in *Norwood v. Baker* (172 U. S. 269). That case, however, presented an instance where by village ordinance, apparently aimed at one person, a portion of whose property was condemned for a street, the entire costs and expenses of the street opening, including the amount awarded for the land taken and the costs and expenses of the condemnation proceedings, were assessed against the abutting property of the person whose land was condemned. The Supreme Court of the United States seems to have limited the case to its own peculiar facts, which amounted to an actual confiscation of property without compensation, and has repeatedly declared that the case is not a precedent authorizing a review of legislative discretion in determining the benefits accruing from local improvements and the proper method of assessing taxes therefor. (See *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *Tonawanda v. Lyon*, Id. 389; *Detroit v. Parker*, Id. 399; *Cass Farm Co. v. Detroit*, Id. 396; *Webster v. Fargo*, Id. 394.)

App. Div.] Second Department, March, 1912.

We do not deem it necessary to pass upon the constitutionality of the attempted taxation of the respondent's right of way because we do not think it was intended by the Legislature that such right of way should be taxed for these street improvements. The respondent's right of way is exclusively devoted to a public use. (*Saunders v. N. Y. C. & H. R. R. Co.*, 144 N. Y. 75; *New York Central & H. R. R. Co. v. Aldridge*, 135 id. 83; *Matter of City of New York, East 136th St.*, 127 App. Div. 672, 675, 676.) It is difficult to see how such property can be benefited by the improvement of a village street passing under it. The only benefit that the learned corporation counsel specifically claims will inure to the railroad company from these improvements is an increase in its business following the increase in business and population resulting to the village from the improvement of its streets. This alleged benefit is too conjectural, fanciful and remote for consideration, and it seems highly improbable that the Legislature intended to tax the right of way on any such assumption. The corporation counsel's reasoning, if valid, would logically permit the taxation of any railroad right of way running through any village or city for general street improvements therein, howsoever far from its right of way. Moreover, such a rule confuses the appellant's business growth with the value of its real estate.

The Legislature has by general statute declared a public policy regarding this matter, and has specifically provided that a highway passing under any railroad shall be maintained and kept in repair by the municipality in which the highway is situated (Gen. Laws, chap. 39 [Laws of 1890, chap. 565], § 64, as added by Laws of 1897, chap. 754, and amd. by Laws of 1902, chap. 140).* The appellant concedes that this statute exempts the respondent's right of way from taxation for these street improvements, but claims that the special act pursuant to which the tax is assessed (Laws of 1899, chap. 517) has repealed the general statute by implication, and authorizes the imposition of the tax in question. Repeals by implication are not favored and will not be presumed unless there is an irrecon-

* Since amd. by Laws of 1909, chap. 158, now Railroad Law (Consol. Laws, chap. 49; Laws of 1910, chap. 481), § 93.—[R.R.]

cilable inconsistency between the two statutes. (*Matter of Tiffany*, 179 N. Y. 455; *Czarnowsky v. City of Rochester*, 55 App. Div. 388; affd., 165 N. Y. 649; *Davis v. Supreme Lodge, Knights of Honor*, Id. 159; *McCartee v. Orphan Asylum Society*, 9 Cow. 437.)

We do not think that chapter 517 of the Laws of 1899 evinces a legislative intention to depart from the general policy established for street assessments similar to those in question. It is true that the statute provides (§ 12) that "No abutting or adjoining property shall be exempt from assessment under this act." It seems highly improbable, however, that the Legislature, by the terms "abutting or adjoining property," intended to include the respondent's mere right of way over the streets contrary to the general policy established by section 64 of the Railroad Law (*supra*). It is much more probable that this clause of the act of 1899 was devised to include churches and charitable institutions which, although benefited by the proposed improvements, would not otherwise have been taxed. In the absence of a clearly and unmistakably expressed legislative intention the act in question should not receive a construction necessitating the imposition of a tax upon the respondent's right of way contrary to the general policy of the State and for improvements of no direct benefit to the property taxed, and the constitutionality of which is at least open to question.

The action in equity may be maintained. (*Scott v. Onderdonk*, 14 N. Y. 9; *Guest v. City of Brooklyn*, 69 id. 506; *Providence Retreat v. City of Buffalo*, 29 App. Div. 160; *Trumbull v. Palmer*, 104 id. 51.)

The judgment should be affirmed.

THOMAS, CARR, WOODWARD and RICH, JJ., concurred.

Judgment affirmed, with costs.

FRANK F. MITCHELL and CHARLES L. MITCHELL, Individually and as Executors, etc., of JOHN MITCHELL, Deceased, Plaintiffs, *v.* WILLIAM E. MITCHELL, Individually and as Executor, etc., of JOHN MITCHELL, Deceased, Defendant.

Second Department, March 29, 1912.

Will — construction — deduction by testator from one share.

A testator, having a wife and three sons, who were his only heirs at law and next of kin, left a will appointing his three sons joint executors and devising to them as such his property to hold in trust during the lifetime of his wife for her sole benefit, and providing: "Third. After the death of my wife I direct my executors to sell all of my real estate and personal property * * * and to divide the proceeds * * * equally among my three sons * * *, deducting from the share of my son William E. the sum of One Thousand dollars." *Held*, that the bequest of the \$1,000 did not lapse, but that the testator intended that after the death of his wife his property should be divided into three equal parts, and the \$1,000 deducted from William's part be divided equally between the other two sons.

The rule that where the disposition of an aliquot part of a residuary bequest fails, such part passes as undisposed of, does not apply in such a case, because there is a valid bequest of the entire estate.

In construing a will the court seeks the intent of the testator and avoids intestacy, if possible.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

George S. Ingraham, for the plaintiffs.

Arnon L. Squiers [*Rufus L. Scott, Jr.*, with him on the brief], for the defendant.

HIRSCHBERG, J.:

One John Mitchell died February 10, 1897, survived by his wife and three sons, who were his only heirs at law and next of kin. He left a last will and testament, appointing his three sons joint executors thereof, and devising and bequeathing to them as such executors all his property to hold in trust during the lifetime of his wife for her sole benefit. The will contained the following directions for the disposition of the principal of said trust estate upon the death of the wife:

APP. DIV.—VOL. CXLIX. 57

"Third. After the death of my wife I direct my executors to sell all of my real estate and personal property which may be then remaining in their hands and to divide the proceeds thereof together with any other moneys belonging to my estate which may be in their hands equally among my three sons, William E. Mitchell, Frank F. Mitchell and Charles L. Mitchell, deducting from the share of my son William E. the sum of One Thousand dollars.

"Fourth. In the event of the death of either of my sons before my wife, I will and direct that the share of my son or sons so dying shall be paid to his or their legal heirs."

The wife died April 12, 1909, survived by the three sons, who now are acting as said joint executors, and who have submitted this controversy in order to obtain a judicial determination regarding the disposition of the \$1,000 directed to be deducted from William's share of the corpus of the trust estate. The plaintiffs claim that the \$1,000 should be deducted from William's share and added to their shares. The defendant claims that the \$1,000 deducted from his share has not been bequeathed and that it passes by intestacy to the testator's next of kin.

It seems to us that a consideration of the language used by the testator shows an intention to bequeath the \$1,000 in question, and that the language employed is legally adequate to consummate that intention. By the 3d paragraph the executors are specifically directed to divide "all" the estate among the three sons designated by name, and such language clearly carries the entire estate to them. The remainder of the paragraph is merely a statement of the proportion or method according to which the division shall be made among the three sons. The division is to be made by giving due consideration both to the direction for a deduction from William's share and the direction for equality, each of which directions to some extent limits the other, and both of which must be considered in ascertaining the testator's intention regarding the amount given to each beneficiary. So construing the will and giving weight to each expression and phrase employed, it would seem to have been the testator's intention that upon the death of the life tenant the executors should convert the estate into personalty and divide the entire amount thereof among the designated

App. Div.] Second Department, March, 1912.

beneficiaries as equally as possible, allowing for a \$1,000 deduction from William's third. Such a division would give Frank and Charles equal shares, each \$500 in excess of William's share, which latter share would be equivalent to one-third of the estate, less the directed deduction of \$1,000.

The elementary rules for the construction of wills require adherence to the testamentary intent and the avoidance of intestacy, if possible. The defendant's objection to the distribution herein suggested is based entirely upon the assumed applicability of the well-settled rule that where the disposition of an aliquot part of a residuary bequest fails, such part passes as undisposed of, rather than in augmentation of the remaining parts, as a residue of residue. (1 Jarman Wills [6th Am. ed.], 738.) Such rule and the authorities cited by the defendant have no pertinency, because in the will before us there has been a valid bequest of the entire estate to designated beneficiaries, and the phrase relied upon as taking an aliquot part thereof out of the bequest relates solely to the measurement or division of the property bequeathed. In other words, the deduction directed by the testator from one share qualifies to that extent the equality of the distribution, but does not qualify the entirety of the bequest to the three sole residuary beneficiaries. In *Skrymsher v. Northcote* (1 Swanst. 566), cited in Jarman (*supra*), a moiety of the residue had been specifically bequeathed to one H., and thereafter the testator had revoked the gift without designating any beneficiary in place of H. Under such circumstances the property was obviously undisposed of by the will. In *Matter of Hoffman* (201 N. Y. 247), cited by the defendant, certain of the residuary legatees had predeceased the testator, and there was no provision in the will for the disposition of their legacies in the event of such a contingency. Obviously, these cases are not controlling if even pertinent.

Judgment is directed for the plaintiffs in accordance with the terms of the submission.

JENKS, P. J., BURR, WOODWARD and RICH, JJ., concurred.

Judgment directed for the plaintiffs in accordance with the terms of the submission, with costs.

ANTON V. SCHWEITZER, Respondent, *v.* HAMBURG-AMERICANISCHE PACKETFAHRT ACTIEN GESELLSCHAFT (Otherwise HAMBURG-AMERICAN LINE), Appellant.

Second Department, March 29, 1912.

Practice — when reply ordered — contract — when *lex contracti* controls — foreign law — presumption that common law is in force — judicial notice of treaty.

As a general rule when new matter set forth in a plea in bar is of such a character that, if true, it will constitute a complete defense to the action unless in some manner it is avoided, it will simplify the issue and prevent surprise at the trial if a reply is ordered pursuant to section 516 of the Code of Civil Procedure showing the grounds of avoidance, if such exist; but no absolute rule can be formulated applicable to all cases in accordance with which such motion should be granted or denied.

Where, in an action by an employee of the defendant, a German steamship company, to recover for personal injuries, alleged to have been caused by reason of a defective windlass, the defendant admits the employment of the plaintiff and his injury under circumstances which would render the defendant liable except for certain provisions of the German law which are pleaded, the statement of the provisions of the foreign law must be deemed a statement of issuable facts and a motion by the defendant to compel a reply should be granted.

In the absence of proof of what the foreign law is, our own law will be followed.

A presumption that the common law is in force where the transaction occurred is indulged in by our courts only in reference to England and those of our sister States which have taken the common law from England.

It seems, that where the performance of a contract made in Germany for services on a vessel is to commence at Hamburg but is not to be completed until the return of the vessel to that port, the *lex loci contractus* will control.

The court may take judicial notice of a treaty between the United States and Germany.

APPEAL by the defendant, the Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 13th day of October, 1911, denying the defendant's motion for an order directing the plaintiff to serve a reply.

App. Div.]

Second Department, March, 1912.

A. Leonard Brougham [Percy S. Dudley with him on the brief], for the appellant.

C. V. Nellany, for the respondent.

BURR, J.:

Plaintiff, an employee of defendant, seeks to recover damages for personal injuries alleged to have been sustained by reason of a defective and improper windlass furnished by the master for his use. Defendant, denying these allegations and alleging assumption of risk by plaintiff, also sets up in the paragraphs of the answer, designated III and IV respectively, certain matters which it contends constitute affirmative defenses. Defendant moved, in accordance with the provisions of section 516 of the Code of Civil Procedure, to compel a reply to such defenses, and from an order denying such motion this appeal was taken.

The order was not made in the exercise of discretion, and contains a recital to that effect. No absolute rule can be formulated applicable to all cases in accordance with which such a motion should be granted or denied. If facts stated in an answer as new matter by way of defense are only capable of denial, reply is as a general rule unnecessary since they are deemed to be controverted (Code Civ. Proc. § 522), although there may be exceptions to this rule. But as a general rule when the new matter set forth in a plea in bar is of such a character that if true it will constitute a complete defense to the action unless in some manner it is avoided, it will simplify the issue and prevent surprise at the trial if a reply is ordered showing the grounds of avoidance, if such exist. (*Olsen v. Singer Manufacturing Co.*, 138 App. Div. 467.) The crucial questions in this case, therefore, are, whether the pleas are those of avoidance, whether if true the facts stated therein might defeat the action, and whether such facts are in turn susceptible of avoidance. In the pleas under consideration are many conclusions of law, but as the result of careful analysis allegations appear in the portion of the answer designated as paragraph III which may be deemed those of fact. These are, that in about the months of July and August, 1906, plaintiff was employed as a member of the crew on defendant's steam-

Second Department, March, 1912.

[Vol. 149.]

ship *Pretoria*; that the steamship was a German seagoing vessel, sailing under the German flag from the port of Hamburg in the Empire of Germany to the port of New York; that the contract of employment was entered into in the Empire of Germany and in accordance with the laws thereof; that both plaintiff and defendant were at that time residents of the German Empire and subjects of the Emperor thereof; that the term of the contract was for a voyage from the said port of Hamburg to the port of New York and return; that plaintiff's injuries were sustained during said voyage and while plaintiff was engaged in the performance of his duties as a member of the crew of said vessel and before it had completed the part of its voyage bringing it to the port of New York, and before said vessel had been entered therein. In addition, the answer contains these statements: "that at all the times when the plaintiff was upon the said steamship, and at the time when he entered the contract aforesaid and at the time when he sustained the injury aforesaid, it was and now is the law of the Empire of Germany that persons who are employed on board of a German seagoing vessel sailing under the German flag, as members of the crew, or in any capacity whatever, and who, while on board such vessel in pursuance of such employment or in consequence thereof, sustain personal injuries by reason of any cause whatsoever, shall have no right to claim, receive, sue for or recover any compensation from the owner of such vessel, or from any person connected with or responsible for the management or operation of such vessel, for the injuries so sustained, or for the damage arising therefrom, unless it shall have been determined by the judgment of a court of competent criminal jurisdiction, that the injuries were willfully or intentionally caused by the person against whom such claim is made or suit brought; that the plaintiff's injuries were not willfully or intentionally caused by the defendant or by any person for whose acts or omissions the defendant is responsible, and it has not been determined by any court or authority that said injuries were caused willfully or intentionally by the defendant or by any other person; that at all of the times aforesaid, it was and now is the law of the Empire of Germany that a person who is employed on board a

App. Div.] Second Department, March, 1912.

German seagoing vessel sailing under the German flag, as a member of the crew, or in any capacity whatever, and who sustains personal injuries through the carelessness or lack of care on the part of, or any neglect of any duty owed by, the owner of such vessel or the person or persons engaged in, or responsible for, the management or operation of such vessel, shall have the right to claim and receive compensation for such injuries and the damage arising therefrom, exclusively from the society organized and existing under and in pursuance of the Sea Accident Insurance Law of the Empire of Germany and known as the 'See-Berufsgenossenschaft,' the sole object, purpose and duty of which it is, as is provided by said law (which was duly enacted by the law making power of the Empire of Germany on or about June 30, 1900, and duly promulgated on July 5, 1900, in the German Imperial Gazette (at page 716, *et seq.*), to indemnify all persons employed on German sea-going vessels, in any capacity whatsoever, against damages sustained by reason of personal injuries occurring to them while on board such vessels, or while acting in the service thereof in any place, no matter how such injuries may be caused, whether by the act or omission or lack of care of any person, or by 'act of God' or by any other thing whatsoever, excepting only an act or omission of the person himself calculated or intended to occasion self-injury, provided such injuries be not sustained while the person injured is engaged in committing a crime, and that the ship owner or other person responsible for the management or operation of such vessel is not in any way liable to him therefor." In the absence of proof of what the foreign law is, our own law must necessarily furnish the rule for the guidance of our courts. (*Savage v. O'Neil*, 44 N. Y. 298.) A presumption that the common law is in force where the transaction occurred is indulged in by our courts only in reference to England and those of our sister States which have taken the common law from England. (*Crashley v. Press Publishing Co.*, 179 N. Y. 27; *Farrell v. Farrell*, 142 App. Div. 605.) What the foreign law is, is, therefore, a question of fact unless it involves the construction of a written statute or judicial opinion, when it may be a question of law (Chase's Steph. Dig. Ev. [2d ed.] 146, note), but even

Second Department, March, 1912.

[Vol. 149.]

then the contents of the statute or the opinion must be introduced in evidence before the trial court. Therefore, the statement contained in the answer of the provisions of the foreign law must be deemed a statement of issuable facts. This plea is in the nature of a special plea in bar, since it admits the allegations of employment and injury under circumstances which would impose liability upon the defendant except for the new and special matter contained therein, which, unless denied or avoided, discharges defendant from such liability. (Wills' Gould Pl. [6th ed.] 512.) These facts, to wit, the provisions of the foreign law, may be met in a reply by denial, or by facts in avoidance, as that something has supervened affecting defendant's non-liability, as contended for under the German law, or by an admission of the facts as pleaded without facts in avoidance. In either event, it seems to us that the issues would be narrowed by a reply and that it would be a wise exercise of discretion to require the same. If the question of the effect of the provisions of the German law is the only one involved, it will be unnecessary for defendant to undertake the somewhat laborious task of proving the same, and there will then be presented a clear, concise legal question. If the facts alleged as to the provisions of such law are traversed, each party is clearly advised in advance what evidence it will be necessary to produce. If the fact and the legal effect of the provisions of the German law are admitted, but plaintiff relies upon some independent facts to take this case out of the operation thereof, defendant will not only be spared the necessity of procuring evidence to prove the foreign law, but will be guarded against surprise through being advised what the claim in avoidance is, and his evidence may be limited to that issue. The learned trial court seemed to entertain some doubt whether the facts as pleaded, if true, would constitute a defense. The opinion in the case contains, among other authorities, a reference to the German Commercial Code (§§ 513, 514), but the contents of this Code was a fact not before the learned court since there was no proof of it. There is also an intimation in the opinion of the learned court that the provisions of the German law were inapplicable under the circumstances here disclosed. We will not at the present

App. Div.] Second Department, March, 1912.

time decide these questions. The relation between the parties was contractual, and the answer alleges that the performance of the contract was to commence at Hamburg, but that said contract was not to be completed until the return of the vessel to that port. There is authority for holding, under such circumstances, that the *lex loci contractus* will control. (*Dike v. Erie Railway Co.*, 45 N. Y. 113; *China Mutual Ins. Co. v. Force*, 142 id. 90; *Valk v. Erie Railroad Co.*, 130 App. Div. 446; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 447.) These questions can better be determined upon demurrer or after judgment than upon a mere practice motion addressed to discretion.

The paragraph of the answer designated IV, reaffirming all the matters and things set forth in the preceding paragraph, alleges that by virtue of the treaty existing between the United States of America and the Empire of Germany, this court has no jurisdiction of the subject of the action. The court may take judicial notice of this treaty and the contents thereof. (Chase's Steph. Dig. Ev. 169; U. S. Const. art. 6, subd. 2; *United States v. Rauscher*, 119 U. S. 407; *People ex rel. Young v. Stout*, 81 Hun, 336.) The facts upon which the applicability of this treaty depends are set forth at length in the paragraph of the answer designated III, and the reply to that portion thereof will be sufficient for all purposes. The construction of the language of the treaty and the meaning thereof present questions of law.

The order appealed from should be modified so as to provide that within twenty days after service of a copy of the order to be entered herein plaintiff shall serve a verified reply to that portion of the answer therein designated as paragraph III, and as so modified the said order appealed from should be affirmed, without costs.

JENKS, P. J., THOMAS, CARR and WOODWARD, JJ., concurred.

Order modified so as to provide that within twenty days after service of a copy of the order to be entered herein plaintiff shall serve a verified reply to that portion of the answer therein designated as paragraph III, and as so modified said order affirmed, without costs.

CASES REPORTED WITH BRIEF SYLLABI AND DECISIONS HANDED DOWN WITHOUT OPINION.

FIRST DEPARTMENT, FEBRUARY, 1912.

PAUL K. POSCHMANN, Appellant, v. RICHARD P. POSCHMANN, Respondent.

Appeal from an order, entered on the 12th day of December, 1911, denying the plaintiff's motion for an injunction *pendente lite*.

PER CURIAM: This is a case in which an injunction *pendente lite* should be granted to preserve the *status quo* until a trial can be had. The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements, and the motion granted. The terms of the injunction and the amount of security to be given will be fixed on the settlement of the order. Present — Ingraham, P. J., McLaughlin, Laughlin, Clarke and Scott, JJ. Order reversed, with ten dollars costs and disbursements, and motion granted. Order to be settled on notice.

ANTON SCHULTE, Appellant, v. JOSEPH PETRUZZI, Respondent.

Appeal from an order, entered on the 22d day of November, 1911, directing the plaintiff to serve a bill of particulars.

PER CURIAM: The plaintiff appeals from an order directing him to serve a bill of particulars of certain allegations of the complaint. A consideration of the complaint shows that much of the information which the plaintiff is directed to furnish is entirely unnecessary inasmuch as the information is sufficiently set forth in the complaint. The order appealed from, therefore, is modified by striking therefrom the paragraphs numbered I, II, III and V, and, as thus modified, the order is affirmed, with ten dollars costs and disbursements to the appellant. Present — Ingraham, P. J., McLaughlin, Laughlin, Clarke and Scott, JJ. Order modified as stated in opinion, and as modified affirmed, with ten dollars costs and disbursements to appellant.

PETER HAMILTON, Appellant, v. MAURICE B. MENDHAM, Respondent.

Appeal — time cannot be extended.

Motion by the defendant to dismiss an appeal by the plaintiff.

PER CURIAM: This action was brought in the City Court to recover damages for a personal injury. On motion that court granted an order allowing the plaintiff to amend the complaint. The defendant appealed

First Department, February, 1912.

[Vol. 149.]

from that order to the Appellate Term, where the order was modified, requiring as a condition for amending the complaint that the plaintiff should pay all taxable costs to the date of the motion to amend. A copy of this order of the Appellate Term was served on the 17th of October, 1911, whereon, upon application of the plaintiff, the presiding justice granted an order allowing an appeal to this court from the order of the Appellate Term. The order allowing such appeal was granted on the 22d of December, 1911, and the defendant, on the 2d of January, 1912, served a copy of this order upon the plaintiff's attorney. On the 26th of January, 1912, the plaintiff served a notice of appeal in pursuance of the order allowing the appeal. That notice of appeal was returned to the plaintiff's attorney upon the ground that it was not taken within the time allowed by the Code. Whereupon the defendant made this motion to dismiss the appeal. Section 3191 of the Code of Civil Procedure provides for an appeal to the Appellate Division of the Supreme Court in the First Department from a judgment or order of the Appellate Term; and section 3193 provides that an appeal authorized by section 3191 must be taken within twenty days after the service of a copy of the order allowing such appeal and a written notice of the date of the entry thereof. As the order allowing the appeal was served on the 2d of January, 1912, the time within which the notice of appeal had to be served expired on the 22d of January, 1912; and as the notice of appeal was not served within the time provided by section 3191 of the Code, it was too late. The court has no power to extend the time to allow an appeal or to open a default in serving the notice of appeal within the time allowed by the Code. The motion, therefore, must be granted and the appeal dismissed, with ten dollars costs. Present—Ingraham, P. J., McLaughlin, Laughlin, Clarke and Miller, JJ. Motion granted, with ten dollars costs.

WILLIAM J BRYON, Appellant, v. CARL SAFIR and Others, Respondents.

Practice — dismissal of complaint — failure to prosecute.

Appeal from an order entered on the 14th day of October, 1911, granting the defendants' motion to dismiss for failure to prosecute.

PER CURIAM: The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendants. Issue was joined June 2, 1908. The case appeared on the call calendar in February, 1911, and was reached for trial March 13, 1911. The court declared a mistrial and permitted the withdrawal of a juror. This motion for dismissal of the complaint for failure to prosecute was made September 28, 1911, upon the ground that nothing had been done by the plaintiff since March 13, 1911. It appears that the plaintiff, while walking on the street, was struck on the head by a hammer which he alleges was dropped by an employee of the defendants. Since the mistrial there has been a change of attorneys and the appellant asserts that he is ready and anxious to go to trial. We think that under the circumstances he should have an opportunity to try his case. As the summer vacation intervened, the delay, from the middle of March, when the first

App. Div.]

First Department, February, 1912.

trial was had, until the following October, was not such as to compel the granting of the motion to dismiss. The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs. Present—Ingraham, P. J., McLaughlin, Laughlin, Clarke and Miller, JJ. Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

SOLOMON L. PAKAS, Respondent, v. FRANK C. HURLEY, Appellant.

Real property—conversion of rents by manager—expenses.

Reargument of an appeal from a judgment entered upon the verdict of a jury and from an order denying a motion for a new trial. (See 148 App. Div. 746.)

SCOTT, J.: We have carefully re-examined this case, and remain of the opinion that the judgment must be reversed and a new trial granted, and this for the reasons stated by Mr. Justice Miller on the former hearing. The slight discrepancy between the facts as stated in that opinion and as they appeared by the evidence is unimportant, if, as we consider the true measure of damage is the amounts of rents collected for stores and apartments, less the sums actually and necessarily expended in so running the building as to retain the tenants and so make any collection of rents possible. Judgment reversed and new trial granted, with costs to appellant to abide the event. Ingraham, P. J., McLaughlin and Clarke, JJ., concurred. Laughlin, J., dissented.

LAUGHLIN, J. (dissenting): On the first argument of this appeal, the fact that the defendant, under his contract of employment as manager of the Hotel Orleans, which authorized him to collect the rents from the occupants of the stores and apartments, was required to deposit the same without deduction to the credit of plaintiff as proprietor of the hotel, was overlooked, and the opinion then delivered, in which I concurred (148 App. Div. 746), contained the erroneous statement of fact that under the agreement the plaintiff was not entitled to the identical money collected by defendant, but only to the net amount remaining after the payment of expenses. It was stated in that opinion that the plaintiff could have elected to treat the defendant as a manager or agent *de son tort*, but on account of the error with respect to the facts, it was held that, whether plaintiff elected to hold defendant on that theory or for wrongfully withholding the possession of the property, defendant was entitled to offset his reasonable disbursements against the rents received. There is no question now but that the record shows that the plaintiff attempted to terminate the employment of the defendant, who refused to be discharged and remained in possession of the property and collected rentals in part for the month of June and for the month of July. The plaintiff has recovered the amount of those rentals on the theory of conversion, less the salary owing to the defendant, the right to offset which is not presented by the appeal. The defendant at the time claimed that he had become the lessee of the premises, but this claim was disproved and he was removed by judicial process at the end of July and he now concedes that he

First Department, February, 1912.

[Vol. 149.]

wrongfully remained in charge of the hotel in defiance of the rights of the owner who was his employer. The theory upon which the judgment is now to be reversed would permit the defendant to wrongfully remain in possession and collect the rentals for a long period in advance, and exercise his discretion with respect to disbursements, and render him liable only for the amount remaining in his hands or liable for use and occupation. Under such ruling the manager of any large hotel or apartment house may at any time disavow his employment and retain possession to the exclusion of his employer for say a single day and collect rentals for days, weeks or months in advance and leave his employer without remedy save to recover for the use and occupation for a day or what he has seen fit not to expend in managing the hotel without authority and wrongfully. I know of no authority for such a decision. The moneys collected by the defendant were due and owing to the plaintiff, and it is about to be held that having wrongfully made the collections his rights are greater than if he continued in charge under his employment. I cannot subscribe to the doctrine that the defendant had any greater right than if he had made the collections under his original contract of employment, by virtue of which he was not authorized to make any deductions and could not check the money out after depositing it in the bank. I am of opinion, therefore, that the judgment is right and should be affirmed.

ROSANNA BATCHELOR, Respondent, v. EUGENE E. HINKLE and TERRY HINKLE, Appellants.

Injunction — removal of encroachment — damages.

Appeal from a judgment entered in the New York county clerk's office on the 10th day of July, 1911.

Judgment affirmed, with costs, on prevailing opinions on former appeals (182 App. Div. 620, and 140 id. 621).

Present — Ingraham, P. J., McLaughlin, Laughlin, Clarke and Scott, JJ.; Laughlin, J., dissented.

LAUGHLIN, J. (dissenting): I am of opinion, for the reasons assigned in my memorandum concurring in the reversal of a former judgment herein in favor of the defendant (*Batchelor v. Hinkle*, 140 App. Div. 621, 625), that plaintiff was not entitled to a mandatory injunction for the removal of the encroachment; but the evidence now before the court is less favorable to the plaintiff on the question of damages than that contained in the former record. The evidence in this record tends to show only nominal damages, and, therefore, I think that this complaint, which is for equitable relief, should have been dismissed without a finding as to the *precise amount of damages*, so that the plaintiff might, if she so desired, have her damages assessed by a jury; but that question is not presented for review, and, therefore, I vote merely for a reversal.

App. Div.] First Department, February, 1912.

**PIETRO CAPORALI, Respondent, v. MICHAEL SANTANGELO and GIUSEP-
PINA SANTANGELO, His Wife, Appellants.**

*Real property — contract — agreement to reconvey — assignment of bid at
sale on foreclosure.*

Appeal from a judgment entered on the 11th day of May, 1911, directing a conveyance of real estate and an accounting of the rents.

Judgment affirmed, with costs, on opinion of McCall, J.

The following is the opinion of McCall, J.:

McCALL, J.: The plaintiff in this case is a man of rather humble circumstances who cannot read or write the English language, who, from his knowledge of the locality where the property (which is the subject of this litigation) is situated, felt he might get a bargain at the sale of same which had been directed in a partition suit pending in this court, and determined to and did go to the salesroom where the property was offered to the highest bidder. He was not familiar with the rules of our court governing such sales, nor was he acquainted with any custom that prevailed in such proceedings, but he bid the property in and obtained it at a price concededly far below its actual value. When the referee demanded the ten per centum before signing the contract the plaintiff found that he had but \$500 with him, and appealing to a friend who was with him to explain the matter to him, he asked the friend to obtain for him a short time in which to produce the required sum, and the referee gave him till five P. M. He started immediately in quest of the amount, and naturally his search took him among Italians, his own race. Within a very short time of the sale, and while some few hours still remained wherein plaintiff would have had the opportunity to raise the necessary money, he turns up in the referee's office with the defendant; the defendant's check for the ten per centum is handed over to the referee, and upon the back of the contract of sale plaintiff, after some talk with one Langone, assigns his rights by affixing his mark to a transfer of same. One could not listen to the trial of this case, being observant of the witnesses in the giving of their testimony, nor make an analysis of the proof adduced without, in my judgment, concluding that a wretched attempt to seize the illiterate man's bargain was attempted. Plaintiff admits he went to defendant to secure the money; that he offered a bonus of \$500 for its advancement; that he needed it only in the hurried exigency for which he had not prepared himself through ignorance of the requirements for deposits on such sales in such amounts, and that upon defendant agreeing to advance the amount he agreed to assign his bid as security for the sum so advanced, but defendant claims the plaintiff came to him in an altogether different spirit, namely, that he had purchased this property without the means to sustain his bid; that he was afraid a "deficiency judgment" would be entered against him, and that in response to his appeal, first, to loan the money, he refused because, as he said to him, he did not have or could not spare the amount, yet upon, as defendant asserts, plaintiff's agreement to give him his bid and thus save himself

First Department, February, 1912.

[Vol. 149.]

from a "deficiency judgment," the defendant immediately accedes, and, strange to add, finds he can afford out of his generosity to give plaintiff \$500 as a gift. It is all too brazenly absurd. It is quite within proper range to state that the plaintiff never heard and never knew what such words "deficiency judgment" meant, and even if he did, what becomes of the idea when the testimony of the defendant himself shows that the plaintiff told him at this very interview that his bargain was so good that he had been offered an advance of several hundred dollars over his bid in the salesrooms immediately on his getting the property? The plaintiff's story is not one that comes to him long after it is demonstrated he has lost a bargain, for within a week of the time defendant advanced the money we find him tendering same back, together with the \$500 bonus he said he promised. The defendant denies this, it is true, but he cannot deny, nor does he attempt to, that on the closing of title, before he became vested with same, plaintiff again tendered the amount, plus the \$500 bonus, and that he refused to accept same. My judgment is that plaintiff is entitled to the relief he prays for. He has been diligent in seeking to secure that which belongs to him and of which he has wrongfully been deprived. Decree and findings accordingly.

The People of the State of New York, Respondent, v. Morton Cole, Appellant.—Judgment affirmed. No opinion.

Marjorie Thayer, Respondent, v. Henry W. Thayer, Appellant.—Judgment and order affirmed, with costs, on *Thayer v. Thayer* (145 App. Div. 268).

Moses Jacobs, Appellant, v. Sidney W. Denzer, Interpleaded, etc., in Place and Stead of Milton Hirshfeld, Respondent.—Judgment and order affirmed, with costs. No opinion.

The People of the State of New York, Respondent, v. John Hartman, Appellant.—Judgment affirmed. No opinion.

Marie M. Conroy, Appellant, v. Louis Goldsmith, Respondent.—Judgment affirmed, with costs. No opinion.

The People of the State of New York, Respondent, v. Andrew Dory, Appellant.—Judgment and order affirmed. No opinion.

The People of the State of New York, Respondent, v. Domenico Scannavino, Appellant.—Judgment affirmed. No opinion.

In the Matter of the Transfer Tax upon the Estate of Edmund Dwight, Deceased. The Comptroller of the State of New York, Appellant; Robert H. Gardiner and Lawrence Minot, Substituted Trustees under a Deed of Trust Executed by Edmund Dwight and Algernon Coolidge to William Minot, Trustee, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Transfer Tax upon the Estate of Arza C. Peck, Deceased. The Comptroller of the State of New York, Appellant; William H. Peck and John A. Peck, Individually and as Executors, etc., of Arza C. Peck, Deceased, and John A. Peck, as Executor, etc., of Janie B. Peck, Deceased, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

App. Div.] First Department, February, 1912.

Otto J. Schultz, Jr., Appellant, v. Otto J. Schultz, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

John C. Tomlinson and Others, Respondents, v. Theodore E. Tomlinson, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Central Trust Company of New York, as Trustee under the Deed of Trust Dated the 21st Day of December, 1894, etc., Plaintiff, v. Fannie Humphreys Gaffney, Respondent, Impleaded with Fredric (or Frederic) E. Humphreys, Appellant, and Jayta H. Von Wolf.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Joseph M. Everett, Respondent, v. Leonard J. Field and Edwin Field, Appellants, Impleaded with John Sherwood, Defendant. C. Percy Tuttle, as Trustee in Bankruptcy of Joseph M. Everett, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Alfred S. Witherbee and Sidney A. Witherbee, Appellants, v. Thomas H. Bowles and Others, Impleaded with Morris Carnegie, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York v. William Oakford. The People of the State of New York v. Edwin A. Weiss.—Motions granted.

James B. Young v. Edwin S. Brower. Meyer L. Sire v. Edward F. Browning.—Motions granted, unless appellants comply with terms stated in order.

Samuel P. Williams v. United Wireless Telegraph Company. (7 cases.)—Motions granted, with ten dollars costs of one motion.

Philipp Ohl v. Gillette Ice Machine Company.—Motion granted, with ten dollars costs.

Algernon S. Norton v. Adam Benz, Jr.—Motion granted, with ten dollars costs.

William D. Tyndall v. Pinelawn Cemetery.—Motion granted.

Dana J. Bugbee v. William I. Overstreet.—Motion for reargument denied, with ten dollars costs.

Dana J. Bugbee v. William I. Overstreet.—Motion granted. See memorandum. Order to be settled on notice.

Dana J. Bugbee v. William I. Overstreet.—Motion granted so far as to stay proceedings for twenty days to enable appellant to apply to a judge of the Court of Appeals for leave to appeal. Order to be settled on notice.

Bert K. Bloch v. Frank Bornat.—Motion denied, with ten dollars costs.

In the Matter of The Minnesota Phonograph Company.—Motion denied, with ten dollars costs.

The People of the State of New York v. Charles Rinkel.—Motion granted; time extended to February twentieth, on which date case must be on calendar for argument.

Color Photography Company v. John J. Donohua.—Motion denied, with ten dollars costs. Order to be settled on notice.

First Department, February, 1912.

[Vol. 149.]

ents, Impleaded with Lamson Consolidated Store Service Company.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Paul Bernhard, Appellant, v. Martha Bernhard and Michael Riegel, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Nathan J. Packard and Moses Packard, Judgment Creditors, Respondents, v. Thomas T. Brittan, Judgment Debtor, Defendant. Metropolitan Trust Company of the City of New York, as Substituted Trustee under the Will of Frederick W. Brittan, Deceased, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. (McLaughlin, J., dissented.)

In the Matter of the Petition of Herbert L. Fordham, Appellant, to Remove an Action Brought in the City Court of the City of New York by Ella J. Croker, Plaintiff, against Herbert L. Fordham, Defendant, to the Supreme Court of the State of New York, and to Change the Place of Trial to the County of Suffolk. Ella J. Croker, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Italian Savings Bank of the City of New York, Respondent, v. Giuseppina De Angelis, Appellant, Impleaded with William Slavis, as Administrator, etc., of Leonardo Autilio, Deceased, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Frederick W. Hannahs, as Administrator, etc., of John Jay Hannahs, Deceased, Respondent, v. The Hammond Typewriter Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Thomas Donoghue, Respondent, v. William H. Callanan and Frank McDermott, Appellants, Impleaded with Thomas Kelly and Thomas McCreehan.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the German Savings Bank in the City of New York, Appellant, for Leave to Sue for Deficiency In re Mortgage No. 1100 Franklin Avenue. John Schleich and Maria E. Schleich, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Miny Rotheim, Appellant, v. Charles Greenberg and Jacob Greenberg, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of Supplementary Proceedings, Percival L. Harden, Judgment Creditor, Appellant, v. William T. Hoops, Judgment Debtor, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Rosie Cohen, Respondent, v. Solomon Antokolitz, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Sigmund Gorlitzer, Respondent, v. Solomon Wolffberg, Defendant. Betty Wolffberg, as Administratrix, etc., of Solomon Wolffberg Deceased, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Antonio Mancuso v. International Capital Development Company.—Motion to dismiss appeal denied, without costs, upon the ground that the

App. Div.] First Department, February, 1912.

affidavit of service of the notice of motion is not sufficient, with leave to renew.

The People of the State of New York v. Ida Friedebaum.— Motion to dismiss appeal granted.

The People of the State of New York v. Morris Lippman.— Motion to dismiss appeal granted.

The People of the State of New York v. Albert Smith.— Motion to dismiss appeal granted unless appellant comply with terms stated in order.

William D. Tyndall, etc., v. Pinelawn Cemetery and Others.— Motion to dismiss appeal denied, without costs.

William D. Tyndall, etc., v. Pinelawn Cemetery and Others.— Motion granted as stated in order.

Anton N. Meyer, as Assignee, v. George Cramer and Others.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms stated in order.

John McTaggart, an Infant, v. Sheffield Farms Slawson Decker Company.— Motion to dismiss appeal granted, with ten dollars costs.

In the Matter of Theodore Kuttner v. Ira Ulman.— Motion to dismiss appeal granted, with ten dollars costs.

In the Matter of Theodore Kuttner v. Ira Ulman.— Motion to dismiss appeal granted, without costs.

The People of the State of New York ex rel. Wallace W. Evans v. William F. Baker, etc.— Motion for reargument denied, with ten dollars costs.

Edward Ermold v. Hans Kaltenhauser and Others.— Motion denied, with ten dollars costs.

San Remo Copper Mining Company v. Elie J. Moneuse.— Motion denied, with ten dollars costs.

Francis C. Neale, Inc., v. Hudson and Manhattan Railroad Company and Others.— Motion denied, with ten dollars costs.

Knickerbocker Trust Company v. Andrew Miller.— Motion granted. Order to be settled on notice.

The People of the State of New York ex rel. William R. Britton v. American Press Association.— Motion denied.

Frank H. Osborn, as Attorney in Fact and General Manager of and Representing George C. Wilce and Others, as Underwriters Doing Business as "Lumber Insurance Association," Respondent, v. Eugene F. Perry, as Attorney in Fact of and Representing C. H. Carleton and Others, as Underwriters Doing Business as the "Lumber Underwriters at Mutual Lloyds," Appellant.— Judgment affirmed, with costs. No opinion. (Ingraham, P. J., and Scott, J., dissented.)

In the Matter of Leonard A. Snitkin.— So much of motion denied as seeks to require petitioner to amplify the supplemental petition; and respondent granted twenty days after service of the order to be entered hereon within which to make and file an answer to the petition and supplemental petition. Order to be settled on notice.

SECOND DEPARTMENT, FEBRUARY, 1912.

FANNIE F. ARCHER, Respondent, v. MARGARET ARCHER, Individually, etc., and Others, Appellants.

Mortgage—foreclosure.

Motion to resettle order. (See 147 App. Div. 44, 929.)

PER CURIAM: As the judgment now stands, after modification in accordance with the order of this court entered herein on the 10th day of November, 1911, there seems to be a conflict in its provisions. It directs a sale of the whole of parcel No. 10, but provides that parcel No. 16, which it seems is a portion of parcel No. 10, should not be sold. In describing so much of the property mortgaged as was owned by Michael A. Archer, one of the parcels was designated as parcel No. 10. The complaint, however, contained an allegation that subsequently to the making of the mortgage the executors named in the will had conveyed a portion of parcel No. 10 which it describes, and it subsequently appears in the complaint that parcel No. 16 is the portion so conveyed. The defendants and appellants move to resettle the order so that it shall exclude from the lien of the mortgage and the direction for sale so much of parcel No. 10 as is specifically described as parcel 16. In affidavits submitted in opposition to the motion to resettle, respondents attack the *bona fides* of this sale. We think they should be held to the allegations of their complaint. Inasmuch, however, as the sale by the executors was had after the execution of the mortgage, it may be that in appropriate proceedings the interests of Allison M. Archer and those claiming under him in such proceeds of sale may be reached by the plaintiff. (*Sayles v. Best*, 140 N. Y. 368.) The pleadings were not framed nor was this action tried upon any such theory, however, and we feel that we are in no position at the present time to grant any such relief. The order of November 10, 1911, should be ressettled so that it should provide that the judgment appealed from is modified by excepting from the lien of the mortgage and the direction for sale parcels 11 to 15 inclusive, and so much of parcel 10 as has been sold by the executors and is specifically described as parcel 16, but without prejudice to proceedings in the Surrogate's Court to compel said executors to account for the proceeds of the sale of parcel 16 and pay the same over to the plaintiff. An application is also made by the appellants for some relief in an action between the same parties described as action No. 2. The record in said action is not before us and we are not in a position to grant any relief therein. It is quite possible that entire relief in that action may be obtained by appropriate application to the Special Term. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred. Motion to resettle order granted, without costs, in accordance with opinion. Order to be settled on notice.

App. Div.] Second Department, February, 1912.

F. W. CARLIN CONSTRUCTION COMPANY, Appellant, v. NEW YORK AND BROOKLYN BREWING COMPANY, Respondent.*Pleading — breach of contract.*

Appeal by the plaintiff from an interlocutory judgment of the Special Term, entered in the office of the clerk of the county of Kings on the 21st day of November, 1910.

JENKS, P. J.: The opinion of Putnam, J., at Special Term is entirely satisfactory and renders superfluous any further discussion of the subject-matter thereof. We need but notice the point pressed here, that the pleading demurred to may be sustained on the theory of breach of contract. The essential features of that pleading are stated in the opinion of Putnam, J. The matter pleaded is so far without the limits of the contract that there cannot be question for fair debate and doubt upon that subject, and hence the theory of breach of contract cannot be sustained. (See *Borough Const. Co. v. City of New York*, 200 N. Y. 157; *Molloy v. Village of Briarcliff Manor*, 145 App. Div. 491.) The interlocutory judgment should be affirmed, with costs, with leave to the plaintiff to plead over upon payment of costs. Hirschberg, Burr, Woodward and Rich, JJ., concurred. Interlocutory judgment affirmed, with costs, with leave to plaintiff to plead over upon payment of costs.

THOMAS McCUE, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.*Railroad — master and servant — negligence — injury to motorman — contributory negligence.*

Appeal by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 29th day of October, 1910, and also from an order entered in said office on the 10th day of November, 1910, denying the defendant's motion for a new trial made upon the minutes.

Judgment and order affirmed, with costs. No opinion. Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., read for reversal, with whom Jenks, P. J., concurred.

BURR, J. (dissenting): I dissent. There was a sharp conflict of evidence in this case, but, assuming the facts to be as testified to by the witnesses for the plaintiff, it appears that McCue, the plaintiff, was employed by the defendant in its car barn, and that he was an experienced motorman. On the night of the accident a sand car had been run into the barn. Holzsky, who was a car cleaner, attempted to move it. This was not only no part of his duty, but he had been forbidden to do it, although he claims that on two previous occasions he had done so. On the latter of these he was reprimanded for so doing. He does not claim that any one gave him instructions to move the car on the night in question. Apparently it was an officious and unauthorized act. He moved the car about twenty-five or thirty feet, and stopped it about a foot and a half from a car in front

Second Department, February, 1912.

[Vol. 149.]

of it. He says that he then put the controller on in order to move it this short distance, intending to jerk the controller off, but for some reason he was unable to do so, and the sand car struck the car in front, knocked the controller handle off, and as it was pushing the cars ahead of it he pulled the pole down from the trolley wire and stopped it. There is no evidence that his inability to remove the controller handle was due to any defect. On the contrary, the evidence is undisputed that after the accident the car was examined and everything about its appliances found to be in good working order. Holzsky jumped off the car, saw plaintiff standing there, and says that he intended to ask him for a pair of handles which he had in his hand, to cut the power off, but because McCue reproved him for moving the car he became frightened and ran to find Moore, the depot superintendent. He told him that the car had run away, but gave him no explanation as to the cause thereof, and it was not until the next morning that he made any statement to any one about having any trouble with the controller handle. As a result of the collision four or five cars had been pushed some considerable distance, the forward end of one of the cars breaking through a partition into the adjoining stockroom. According to plaintiff's evidence, Moore came out to see what the difficulty was, and, after he had looked at the cars, said to him: "Mike, put on the pol. and run this car back there till I see the amount of damage that is done." Plaintiff admits that he knew of the fact of the collision; that he did not ask Holzsky what had caused it; did not get upon the car to see what the trouble was or do anything to ascertain the condition of the car. He stepped between the cars and put the pole on the wire. The power was on, and as a result the cars were moved together and he was crushed. Plaintiff admits that when he went between these cars he did not know whether the power was on or off, and that he could have put the trolley pole on by standing on the back platform or on the bumper. It is true that he says that the last was a dangerous place upon which to stand. If that is so, the position between the cars was still more dangerous. Plaintiff says that he noticed before he placed the pole on the wire that there was no controller handle on the car, and at that time he had one in his hand which would have fitted it. He admits that if he had gone on the platform of the car he could have told in an instant whether the power was on or off. If we assume, for the sake of the argument, that the notice under the Employers' Liability Act* was sufficient; and if we assume, for the sake of the argument, that Moore's direction to him was an act of superintendence, if we assume for like purpose that section 42a of the Railroad Law† applies, so that Moore was a vice-principal, still plaintiff has not made out his case. Moore gave no directions to him as to how he was to put this pole on. He simply told him to do the act. Plaintiff selected his own method of doing it, and it proved to be a dangerous one. Viewed as a common-law action

* Laws of 1902, chap. 600.—[REP.]

† Gen. Laws, chap. 39 (Laws of 1890, chap. 565), § 42a, added by Laws of 1906, chap. 657.—[REP.]

App. Div.] Second Department, February, 1912.

defendant's liability is not established. The evidence shows that plaintiff had more knowledge of the dangerous conditions at that time existing than Moore had, and was equally well informed as to the dangers resulting therefrom. He knew that, if the power was not off, it was a dangerous thing to attempt to put the pole on while standing between two cars on the track. Yet he took no pains to ascertain whether the power was on or off, although by stepping upon the car he could have ascertained this. He took a dangerous position between the cars although it would have been entirely feasible for him to have replaced the pole from the platform, which position would have been entirely safe so far as he is concerned, even though the power was on. I think clearly the plaintiff has failed to prove any negligent act on defendant's part or his own freedom from contributory negligence.

MARGARET LYNCH, Respondent, v. THE TOWN OF RHINEBECK, Appellant.

Municipal corporation — negligence — hole in street — liability of town.

Appeal by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Dutchess on the 12th day of April, 1911, and from an order denying a motion for a new trial.

Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Carr, Woodward and Rich, JJ., concurred; Thomas, J., read for reversal.

THOMAS, J. (dissenting): The plaintiff, injured by stepping into a dangerous hole in defendant's street, has recovered a verdict. The liability of the town, as alleged, is based on the negligence of one Leary, who, by some authority, caused the work to be done. Aside from exceptions to the admission of evidence the sole question is whether Leary was a town superintendent, inasmuch as only the negligence of such official can create liability on the part of the town. (Highway Law [Consol. Laws, chap. 25; Laws of 1909, chap. 80], art 4, § 74.) The Highway Law was enacted in February, 1909, at which time one Staley was commissioner of highways and Leary was by him deputed to do work in the locality in question. After the Highway Law came Staley was elected town superintendent of highways, pursuant to it. (Art. 4, § 40.) Section 44 of such article is as follows: "The town board of a town may, in its discretion, upon the written recommendation of the town superintendent, appoint a deputy town superintendent, to be nominated by such town superintendent, to assist him in the performance of his duties. Such deputy superintendent shall act as such during the pleasure of the town superintendent." It will be observed that the duties of the deputy superintendent are, in their nature, those of the superintendent, and there is force in the contention that the negligence of the deputy in regard to such duties may make the town liable under section 74, article 4, of the Highway Law. But Leary was not a deputy superintendent. That officer is appointed by the town board upon the nomination of the superintendent. There is no evidence that Leary was either nominated or appointed. He was a person hired by the town superintendent to take charge of work in a road district. The learned trial court considered that the negligence of Leary was that of the superintendent. The liability of

Second Department, February, 1912.

[Vol. 149.]

the town is purely statutory, and it is not contemplated that the negligence of a person working under the superintendent shall be imputed to him, even if the negligent act relate to superintendence. The duties of the superintendent are many and varied, and their discharge may require many widely diversified acts of operation and of superintendence on the part of a number of persons distributed through the town. But it is not conceivable that the statute by its limited words intended that the culpability of a person who is a mere overseer should reach through the superintendent to the town so as to charge it with liability. The judgment and order should be reversed and the complaint dismissed, with costs.

In the Matter of the Application of Franklin A. McConaughy for Admission to the Bar.—Application granted. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Annie Anderson, as Administratrix, etc., Respondent, v. Poughkeepsie Light, Heat and Power Company, Appellant.—Motions denied, without costs. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

William Geraerds, Respondent, v. Louis Rosenberg and Others, Defendants, Impleaded with Edward Snyder, Appellant.—Motion for leave to appeal to the Court of Appeals denied, without costs. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

In the Matter of the Probate of the Last Will and Testament of Ellen Hagerty, etc., Deceased.—This motion will be held open for two days further, inasmuch as appellant's attorney has not complied with the rule* heretofore called to his attention, in that he has not filed any affidavit showing merits. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

Annie McDonnell, as Administratrix, etc., Appellant, v. Metropolitan Bridge and Construction Company, Respondent.—Motion for leave to appeal to the Court of Appeals granted, without costs. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

Jacob Neu and Others, Copartners, etc., Appellants, v. William J. Fox, Respondent.—Upon filing the stipulation of William J. Fox, motion for stay granted, without costs. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

The People of the State of New York, Respondent, v. James Butler, Incorporated, Appellant.—Motion for leave to appeal to the Court of Appeals granted, without costs. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

The Town of Hempstead, Appellant, v. Newbold T. Lawrence and Others, Respondents.—Motion for reargument denied, with ten dollars costs. Motion to resettle order denied, without costs. Present—Burr, Thomas, Carr and Woodward, JJ.

Joseph Biehl, Respondent, v. The Erie Railroad Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ.

* See App. Div. Rules, 2d Dept. Special Rule.—[REP.]

App. Div.] Second Department, February, 1912.

Luigi Caronoano, Appellant, v. Israel Pomeranz, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas and Woodward, JJ., concurred; Carr and Rich, JJ., dissented.

John J. Gordon, Respondent, v. The Law Reporting Company, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, P. J., Carr, Woodward and Rich, JJ., concurred; Thomas, J., dissented upon the ground that authority to make the contract is not shown.

The People of the State of New York, Respondent, v. Sheffield Farms-Slawson-Decker Company, Appellant, Impleaded with Benjamin S. Halsey and Loton Horton, Defendants.—Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Hirschberg, Thomas, Carr, Woodward and Rich, JJ., concurred.

The People of the State of New York ex rel. The New York Central and Hudson River Railroad Company, Respondent, v. Robert H. Neville and Others, Assessors of the City of Yonkers, Westchester County, New York, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ., concurred.

Edward A. Richards, Respondent, v. The City of New York, Appellant.—We have concluded, in order that the practice may be uniform, to follow the decision of the First Department in *Ryan v. Murphy* (116 App. Div. 242). Order reversed, without costs, and motion denied, without costs. Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ., concurred.

Margaret Allum Smith, Respondent, v. George D. Smith, Jr., Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Staten Island Water Supply Company, Respondent, v. The City of New York, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Thomas and Carr, JJ., concurred.

Franklin A. Wiethan, Respondent, v. New Paltz, Highland and Poughkeepsie Traction Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ.

Annie Crawford, Respondent, v. Abraham Washor, Appellant.—Motion to dismiss appeal denied, without costs. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

In the Matter of the Last Will and Testament of Ellen Haggerty, Deceased.—Motion denied, on condition that appellant pay ten dollars costs, perfect her appeal with due diligence, place the cause upon the next calendar, and be ready for argument when reached; otherwise motion granted, with ten dollars costs. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

In the Matter of the Application of Robert C. Whitten for a Writ of Certiorari to William J. Gaynor, Mayor of the City of New York, and James G. Wallace, Jr., Chief of the Bureau of Licenses of the City of New York.—

Second Department, February, 1912.

[Vol. 149.]

Motion for writ of certiorari denied, without costs, and proceedings dismissed, without prejudice to any action or proceeding which the relator may commence in the Supreme Court, Special or Trial Term, and stay vacated. Present—Jenks, P. J., Burr, Woodward and Rich, JJ.

John Andriuszis, Respondent, v. Philadelphia and Reading Coal and Iron Company, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, on the authority of *Andriuszis v. Philadelphia & Reading Coal & Iron Co.* (143 App. Div. 607). Jenks, P. J., Burr, Woodward and Rich, JJ., concurred. Burr, J., also concurred upon the further grounds (1) that if Shukavage did employ the method of removing the tamping from the first hole, a verdict based upon the finding that after such tamping had been removed and the hole recharged such method would not be equally effective with the other method of drilling a second hole, so far as exploding the charge in the first hole is concerned, is against the weight of the evidence; (2) that defendant is not liable for the negligence of Shukavage, if any, under the statutes of Pennsylvania as construed by the Supreme Court of that State. (*D'Jorko v. Berwind-White Coal Mining Co.*, 281 Penn. St. 164.) Hirschberg, J., dissented.

Lewis J. Feynman, Respondent, v. Samuel Goldberg, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Norman R. Hilderbrandt, Respondent, v. George Seitz, Appellant, Impleaded with Josiah B. Tisdale and Others, Respondents, and Others.—Order of the County Court of Queens county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

In the Matter of the Probate of the Last Will and Testament of John J. Reynolds, Deceased. Margaret C. Lawrence, Appellant; Hugh F. Reynolds and Margaret Reynolds, Respondents.—Decree of the Surrogate's Court of Queens county reversed and issues ordered to be tried by a jury, with costs of the appeal to abide the event of the new trial, payable out of the estate, on the authority of *Matter of Tompkins* (69 App. Div. 474) and *Matter of Richardson* (137 id. 108). Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ., concurred. Order to be settled before Mr. Justice Thomas.

The Long Island Railroad Company, Respondent, v. Mary T. Mulry and Others, Appellants.—Judgment reversed and new trial granted, costs to abide the final award of costs, on the authority of *Scheer v. Long Island R. R. Co.* (127 App. Div. 267). Jenks, P. J., Hirschberg, Burr, Thomas and Carr, JJ., concurred.

Michael Mannion, Respondent, v. Edward G. Vail, Jr., Appellant.—Judgment and order of the Municipal Court unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ.

Frank Palmeso, an Infant, by Giuseppe Palmeso, His Guardian ad Litem, Respondent, v. Edwin D. Morgan, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

App. Div.] Second Department, February, 1912.

The People of the State of New York ex rel. Howard S. Starrett, Appellant, v. Eugene C. Gilroy, a City Magistrate, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

Jacob Schmitt, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas and Carr, JJ., concurred; Woodward and Rich, JJ., dissented.

Title Guarantee and Trust Company, Individually and as Executor, etc., of Mary Augusta Mott, Deceased, Respondent, v. Philip Sugerman and Royal Bank of New York, Appellants, Impleaded with George Billings, as Substituted Trustee, etc., and Others, Defendants.—Order affirmed, with ten dollars costs and disbursements. (See *Pratt v. Clark*, 124 App. Div. 248.) Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Frederick Winckler and Another, Respondents, v. Louis Winckler, Individually and as Executor, etc., Appellant.—Motion for stay dismissed, without costs. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Rebecca Altman, Appellant, v. Harry Howard Altman, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

James C. Bingham and John J. Fitzgerald, Copartners, Doing Business under the Firm Name of Bingham & Fitzgerald Company, Appellants, v. East Massapequa Realty Company, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

Frank W. Bond, Appellant, v. Bush Terminal Company, Respondent.—Order modified by omitting direction to average earnings, and also the clause, "cannot with due diligence be ascertained by him," and as so modified affirmed, without costs. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

Alex Butnors, Respondent, v. National Sugar Refining Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ.

William H. Coonan, Respondent, v. Hamburg-American Packet Company, Appellant. (Appeal No. 2.)—So much of order made on August 22, 1911, as is appealed from affirmed. Order of September 1, 1911, affirmed. Ten dollars costs and disbursements to respondent. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

George H. Donahue, Respondent, v. Robert C. McCorkle, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

J. P. Duffy Company, Respondent, v. Michael Fischetti, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

William W. Farley, as State Commissioner of Excise of the State of New York, Respondent, v. Edward F. Gordon and National Surety Company,

Second Department, February, 1912.

[Vol. 149.]

Appellants.—Judgment and order affirmed, with costs. No opinion. Hirschberg, Thomas, Carr and Rich, JJ., concurred; Burr, J., not voting.

Henry Finley, Respondent, v. Henry D. Kleinman, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ., concurred.

Granulator Soap Company, Appellant, v. William Haddow, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., not voting.

Oliver W. Hicks, Respondent, v. John Sarano, Appellant.—Order of the County Court of Nassau county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

In the Matter of the Application of David Blumberg, Respondent, for an Order Discharging a Mechanic's Lien, Filed by Samuel Sherusky and assigned to Lena Greenbaum, Lienor, Appellant. (Appeal No. 2.)—Order reversed, with ten dollars costs and disbursements, on authority of *Matter of Blumberg, No. 1 (ante, p. 303)*, decided herewith. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

In the Matter of the Compulsory Judicial Settlement of the Account of Henry S. Dollard and Albert H. Dollard, as Executors, etc., of Samuel H. Dollard, Deceased, Appellants. Theodore E. Dollard, Respondent.—Order of the Surrogate's Court of Kings county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., not voting.

In the Matter of Proving the Alleged Last Will and Testament of George Marshall, Sr., Deceased. Hazel Holloway, Appellant; George Marshall and Henry S. Marshall, as Executors, etc., of George Marshall, Sr., Deceased, and Adeline Bedell, Respondents.—Decree of the Surrogate's Court of Richmond county affirmed, with costs. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

Marie Klein, Respondent, v. Brooklyn Majestic Theatre Company, Appellant. (Appeal No. 1.)—Order reversed, with ten dollars costs and disbursements, and motion denied, with costs. We think that the order for the second examination should stand. It appears possible that the same cause required the amputation of both breasts, and if so, the plaintiff could not attribute the injury to the right breast, for which she seeks damages, to the negligence, or wholly to the negligence of the defendant complained of in this action. Defendant is not chargeable with shortcomings in the matter, and the facts shown justified the Special Term in granting the second order, which is properly limited in its scope. (See *Dambmann v. Butterfield*, 15 Hun, 495.) Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

John Lang, Respondent, v. E. Hermann Mueller, Appellant, Impleaded with Lizzie Lang and Martha Mueller, Defendants.—Judgment affirmed, with costs, on the ground that defendant Mueller has not established that he was a purchaser for a valuable consideration within the meaning of

App. Div.] Second Department, February, 1912.

the Real Property Law.* (*Turner v. Howard*, 10 App. Div. 555.) Hirschberg, Thomas, Carr and Rich, JJ., concurred; Burr, J., not voting.

Francesco Lattanzio, Appellant, v. Salvatore Sarantonio, Respondent.— Judgment and order of the County Court of Queens county affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Carr and Rich, JJ., concurred; Burr, J., not voting.

Georgianna L. Le Baron, Appellant, v. Frances E. Barker, Respondent.— Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ., concurred.

Mechanics Bank and Patrick H. Quinn, as Sheriff of the County of Kings, Respondents, v. Jacob Becker, Sometimes Known as Jacob Becker or Joe Becker, and Others, Defendants, Impleaded with Wolf Friedman, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

Harvey Murdock, Appellant, v. Thomas L. Leeming and The Brooklyn Trust Company, as Executors, etc., of Leonard J. Busby, Deceased, Respondents, Impleaded with Melle G. Busby, and Others, Defendants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., not voting.

Katherine O'Neill, an Infant, by John J. O'Neill, Her Guardian ad Litem, Respondent, v. Douglas F. Maltby and Peter Small, as Copartners Doing Business under the Firm Name and Style of Maltby & Small, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

The People of the State of New York ex rel. C. Stewart Cavanagh, Appellant, v. Rhinelander Waldo, as Police Commissioner of the City of New York, and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

The People of the State of New York ex rel. Louis Flaxman, Appellant, v. Joseph P. Hennessy and Others, as and Composing the Board of Assessors of the City of New York, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., not voting.

The People of the State of New York on Complaint of Albert V. Pitt, Respondent, v. John P. Koch and Michael Holmes, Appellants.— Order of the County Court of Kings county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

The People of the State of New York on Complaint of Owen Rooney, Respondent, v. John P. Koch, Appellant.— Order of the County Court of Kings county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Burr, J., not voting.

* See Consol. Laws, chap. 50; Laws of 1909, chap. 52.—[REP.]

Fourth Department, February, 1912.

[Vol. 149.]

Abbie W. Smith, Appellant, v. Ada May and Others, Defendants, Impleaded with George Dees, Respondent.—Judgment affirmed, with costs. No opinion. Hirschberg, Thomas, Carr and Rich, JJ., concurred; Burr, J., not voting.

Union Bank of Brooklyn, Respondent, v. David Schneider and Others, Appellants.—Order of the County Court of Kings county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Richard M. Van Gaasbeek, Respondent, v. Tisdale Lumber Company and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Edward C. Wright, as Executor and Trustee under the Last Will and Testament of Elizabeth Lowerre, Deceased, Respondent, v. Almira E. McConnell and William W. Lowerre, Appellants, Impleaded with Dorothy Elizabeth McConnell and Others, Defendants.—Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Thomas, Woodward and Rich, JJ., concurred.

FOURTH DEPARTMENT, FEBRUARY, 1912.

Frank E. Cady, Appellant, v. Danforth R. Lewis and Lucinda Lewis, Respondents, Impleaded with George S. Cady.—Judgment affirmed, with costs. All concurred.

John W. Storandt, Appellant, v. Vogel & Binder Company, Respondent.—Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, that it was error for the trial court to hold that the statement of defendant's counsel in summing up to the jury, that plaintiff "went into bankruptcy and beat his creditors out of \$15,000," was proper and that the jury might consider it as having a bearing upon plaintiff's credibility as a witness. All concurred, except McLennan, P. J., and Robson, J., who dissented.

John W. Truesdell, as Administrator, etc., of John Fitzgerald, Deceased, Appellant, v. Hannie L. Bourke, Respondent.—Judgment affirmed, with costs. All concurred.

Edward F. La Due, Respondent, v. The New York, Chicago and St. Louis Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Mary Debottis, Respondent, v. Frank Debottis, Appellant, Impleaded with the National Bank of Auburn.—Judgment reversed and new trial granted, with costs to appellant to abide event. Held, that the findings are against the weight of the evidence. All concurred, except Kruse and Robson, JJ., who dissented.

Morris Fox, Respondent, v. Jacob Kahn and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Empire Limestone Company, Respondent, v. Millard & Lupton Company, Appellant. (Appeal No. 1.)—Order denying motion to change

App. Div.] Fourth Department, March, 1912.

venue affirmed, with ten dollars costs and disbursements. All concurred, except Foote, J., who dissented.

Empire Limestone Company, Respondent, v. Millard & Lupton Company, Appellant. (Appeal No. 2.)—Order striking out amended answer reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. All concurred.

Charles C. Bosche and Robert Bosche, Respondents, v. John A. Cramer, Appellant.—Judgment affirmed, with costs. All concurred.

Antonina Hankowska, Respondent, v. Buffalo Savings Bank, Appellant.—Judgment of Special Term and of City Court reversed and new trial granted, with costs in all courts to appellant to abide event. Held, that receiving in evidence the marks made by the plaintiff in open court was prejudicial error. New trial to be had on February 12, 1912, at ten A. M. All concurred, except McLennan, P. J., who dissented.

B. Parker Chick, Respondent, v. The Menihan Company, Appellant.—Judgment affirmed, with costs. All concurred.

James U. McKay, as Administrator, etc., Respondent, v. Syracuse Rapid Transit Railway Company, Appellant.—Motion for leave to appeal to Court of Appeals granted.

In the Matter of the Application of the City of Buffalo to Acquire in Fee Simple Lands and Premises along the Water Front between Georgia and Jersey Streets for Park Purposes. (Proceeding No. 2.)—Motion for reargument denied, with ten dollars costs.

In the Matter of Clifford H. Newell, an Attorney and Counselor at Law.—This matter is directed to be resubmitted on March 6, 1912.

George H. Thompson, Appellant, v. New Academy Theater Company, Respondent.—Passed twice and dismissed, with costs, under rule 39.*

Elizabeth F. Dunn, as Administratrix, etc., of Thomas Dunn, Deceased, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Passed twice and dismissed, with costs, under rule 39.*

FOURTH DEPARTMENT, MARCH, 1912.

KHALIL A. BISTANY, Appellant, v. JAMES C. FARGO, as President of the AMERICAN EXPRESS COMPANY, Respondent.

Carrier—negligence—damage to freight.

Appeal from a judgment of the Supreme Court in favor of the defendant, entered in the Erie county clerk's office on the 27th day of March, 1911, upon the verdict of a jury rendered by direction of the court after a trial at the Erie Trial Term. Action to recover alleged loss on barrels of "sheep guts" shipped from Constantinople, Turkey, to Buffalo, New York, alleging that the same were damaged in transit.

FOOTE, J.: While the contents of the five barrels of sheep guts, were all to some extent, in bad order on their arrival in Buffalo, the two barrels

* General Rules of Practice, rule 39.—[REP.]

Fourth Department, March, 1912.

[Vol. 149.]

which were broken open were in far worse condition and their value destroyed. If the breakage of these two barrels occurred in transit, their condition was sufficient evidence of negligent rough handling to call upon the defendant to show that the damage was occasioned in a manner or at a time or place to relieve the defendant from liability under the shipping contract. We think the evidence presented a question of fact for the jury as to whether these two barrels were broken and damaged in transit or before their delivery to the drayman who took them from the station to the custom house in Buffalo. If so broken, the jury could have found that it caused or contributed to the damaged condition of the contents. For this reason we think the learned trial judge was in error in directing a verdict for the defendant. The judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event. All concurred, except Kruse, J., who dissented upon the ground that it does not appear that the bad condition of the contents of the barrels was through any fault of the defendant or from any cause for which it is liable. Judgment reversed and new trial granted, with costs to appellant to abide event.

Ernest V. Dunlevie, Appellant, Respondent, v. John R. Droney, Respondent, Appellant, Impleaded with Justin W. Spangenberg.—Judgment and order affirmed, without costs. All concurred, except Spring, J., who dissented upon the ground that if the plaintiff is entitled to recover at all, he should recover for all the timber on the tract, which so far as appears would naturally have been delivered to the river on the way to market.

Clara M. Ward, Respondent, v. International Railway Company, Appellant.—Judgment and order reversed and new trial granted, with costs to appellant to abide event, on the ground that the damages were excessive in view of the charge of the court that no damages can be given in this case for permanent injuries. All concurred, except McLennan, P. J., who dissented.

The Concordia Fire Insurance Company of Milwaukee, Respondent, v. Calvin L. Stowell, Appellant.—Judgment affirmed, with costs. All concurred; Foote, J., not sitting.

Harriet S. Arnett, Appellant, v. State Mutual Life Assurance Company, Respondent.—Judgment vacated and order modified by granting a new trial on the ground that the verdict of the jury is contrary to and against the weight of the evidence, without costs of this appeal to either party. All concurred.

John Hyland, Respondent, v. Josephine Mark, Appellant.—Judgment and order affirmed, with costs. All concurred; Foote, J., not sitting.

Thomas B. Smith, Appellant, v. Camden Creamery, Respondent.—Judgment affirmed, with costs. All concurred.

Leslie G. Loomis and Leslie G. Loomis, Jr., Appellants, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment and order affirmed, with costs. All concurred.

App. Div.]

Fourth Department, March, 1912.

Enoch Round, Respondent, v. The Niagara Falls Power Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Alfred W. Chilcott, Appellant, v. The Broadway Brewing and Malting Company, Impleaded with Henry F. Jerge, Special Deputy Commissioner of Excise for the County of Erie, Respondent.—Judgment affirmed, with costs. All concurred.

Elizabeth R. McGinn, Respondent, v. Margaret V. Lighthouse and Others, as Executors, etc., of John C. Lighthouse, Deceased, Appellants.—Judgment affirmed, with costs. All concurred.

Roscoe G. Norton, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment affirmed, with costs. All concurred.

Edward Garvey, Respondent, v. Oldbury Electro-Chemical Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Hattie L. Austin, Respondent, v. Town of Rathbone, Appellant.—Judgment and order affirmed, with costs. All concurred.

Dorothy Brettle, an Infant, by Eva Brettle, Her Guardian ad Litem, Respondent, v. Frank C. Hibbard, Appellant.—Judgment and order affirmed, with costs. All concurred.

Forman & Zelter, Inc., Respondent, v. Charles T. Thatcher, Appellant.—Judgment affirmed, with costs. All concurred.

Margaret F. Welch, Respondent, v. Frontier File Company, Appellant, Impleaded with Others.—Order affirmed, with ten dollars costs and disbursements. All concurred.

The People of the State of New York, Respondent, v. Frank Griffin and John Walley, Appellants.—Judgment and order affirmed, with costs. All concurred.

Maverick-Clarke Litho Company, Appellant, v. Hayes Lithographing Company, Respondent.—Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

Elmer L. Mitzky, an Infant, etc., Appellant, v. Duffy-McInnerney Company, Respondent.—Motion granted and appeal dismissed, with costs.

Edgar T. Munger, Respondent, v. Lyndon D. Wood, Appellant.—Appeal dismissed, without costs, on stipulation filed.

In the Matter of the Application of the City of Buffalo, Appellant, to Acquire Lands in Fee Simple for the Purpose of Widening Grider Street, between Delavan Avenue and Kensington Avenue. Charles W. West, Individually and as Trustee under the Last Will and Testament of Charles E. West, Deceased, Appellant; The Ziegele Brewing Company, Respondent.—Order affirmed, without costs of this appeal to either party. Held, 1. That the appellant West is not entitled to substantial damages for the right of way. 2. That the Ziegele Brewing Company is not entitled to recover damages for the building as real estate, but only for the cost of moving and placing the same on adjoining premises. (See *Matter of City of New York [Hawystone Street]*, 137 App. Div. 630; affd., 199 N. Y. 587; *Matter of City of New York [Briggs Avenue]*, 118 App. Div. 224.) All concurred.

In the Matter of the Application of Andrew G. Drummer, an Elector of

Fourth Department, March, 1912.

[Vol. 149.]

the Town of Dayton, Respondent, for a Writ of Certiorari to the Town Board of the Town of Dayton. Wirt W. Jones, Supervisor, and Others, Constituting the Town Board of the Town of Dayton, Appellants.—The determination of the present appeal is held until the review of the proceeding by the court after the filing of the return.

In the Matter of the Application of William H. Covert, Appellant, for a Writ of Mandamus to Michael E. Monahan, as Comptroller of the City of Syracuse, Respondent.—Order affirmed, with costs. All concurred.

In the Matter of the Application of Charles H. Kenyon, Respondent, to Compel the Delivery of Books and Papers in the Possession of John Martin, Appellant.—Order affirmed, with costs, without passing upon the validity of petitioner's title to the office. All concurred.

Sarah F. Lyth and Samuel E. Lyth, Individually and as Executors, etc., of John Lyth, Deceased, and Others, Appellants, v. Alfred Lyth, Respondent.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Gustav H. Poppenberg, Appellant, v. R. M. Owen & Company, Respondent.—Order, so far as appealed from, affirmed, with ten dollars costs and disbursements. All concurred.

Bertha Woempler, Sometimes Known as Bertha Smith, Respondent, v. Adaline Fernandes, Appellant.—Judgment affirmed, with costs. All concurred.

George H. Thompson, Appellant, v. New Academy Theater Company, Respondent.—Judgment affirmed, with costs. All concurred.

Elizabeth F. Dunn, as Administratrix, etc., of Thomas Dunn, Deceased, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment affirmed, with costs. All concurred, except Kruse, J., who dissented upon the ground that in view of the defendant's rules and orders and the signals given, and the unfamiliarity of the deceased with the road and conditions at the place of the accident, the question of contributory negligence, as well as that of the defendant's negligence, was for the jury.

Anthony Kozlowski, Appellant, v. Rochester, Syracuse and Eastern Railroad Company, Respondent.—Judgment affirmed, with costs. All concurred.

Salvatore Sheusi, Respondent, v. The Erie Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Ellen E. Clifford, Plaintiff, v. City of Rochester, Defendant.—Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs. All concurred, except Kruse, J., who dissented upon the ground that as the entire walk was covered with snow at the time the notice was given, and so remained until the plaintiff fell, the notice was sufficient; she could not foresee, and was not required to point out the precise point where she would fall.

B. Parker Chick, Respondent, v. The Menihan Company, Appellant.—Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

App. Div.]

Fourth Department, March, 1912.

In the Matter of Philip V. Fennelly, an Attorney and Counselor at Law.—Matter referred to Vernon Cole, Esq., an attorney residing at Buffalo, N. Y., to take the proofs concerning the matters alleged in the petition and report the same to the court, with his opinion thereon.

In the Matter of the Appointment of Two Trustees of the City and County Hall for the Use of the City of Buffalo and the County of Erie, to Succeed Henry V. Bisgood and Frank Whaley, Whose Terms of Office Expire on May 2, 1912.—The said trustees Henry V. Bisgood and Frank Whaley are hereby appointed as trustees to succeed themselves, each for the term of six years from the 2d of May, 1912.

David Scanlin and Susan M. Scanlin, His Wife, Respondents, v. Amelia C. Gibson, Appellant.—Judgment affirmed, without costs. All concurred, except Robson, J., who dissented.

Jennie Marks, as Administratrix, etc., of William T. Marks, Deceased, Appellant, v. The Delaware, Lackawanna and Western Railroad Company, Respondent.—Judgment reversed and new trial granted, with costs to appellant to abide event. Held, that the plaintiff made out a *prima facie* case and that the nonsuit was improperly granted. All concurred.

William E. Brockenshire, Jr., by William E. Brockenshire, Sr., His Guardian ad Litem, Respondent, v. The Erie Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred, except Spring, J., who dissented upon the ground that as matter of law the plaintiff was guilty of contributory negligence.

John Pulis, Appellant, v. James C. Stewart and Alexander M. Stewart, Individually and as Copartners under the Firm Name of James Stewart & Company, Respondents.—Order affirmed, with costs. All concurred, except Spring and Kruse, JJ., who dissented.

Stanislaus Borowski, Respondent, v. Ocean Accident and Guarantee Corporation, Limited, Appellant.—Interlocutory judgment affirmed, with costs, with leave to the defendant to plead over within twenty days upon payment of the costs of the demurrer and of this appeal. All concurred.

In the Matter of the Application of John Horan, Respondent, for a Writ of Mandamus against Clyde E. Porter, as Town Clerk of the Town of Ridgeway, Orleans County, New York, Appellant.—Appeal dismissed, without costs, upon the ground that the final order has been complied with and the election held. All concurred.

Joseph B. Joyce, Appellant, v. Harriet S. Curtis, Respondent.—Order affirmed, with costs. All concurred.

Minerva J. Weagant, as Administratrix, etc., of William S. Weagant, Deceased, Plaintiff, v. The New York Central and Hudson River Railroad Company, Defendant.—Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs. All concurred; Foote, J., not sitting.

John E. Ottaway, Appellant, v. Moss Mosely, Respondent.—Judgment and order affirmed, with costs. All concurred.

Lena Schlicht, Respondent, v. International Railway Company, Appel-

Fourth Department, March, 1912.

[Vol. 149.]

lant.— Judgment and order affirmed, with costs. All concurred; Spring, J., not sitting.

Anna M. Mensing, as Administratrix, etc., of Theodore W. Mensing, Deceased, Appellant, v. Cook Iron Store Company, Respondent.— Judgment and order affirmed, with costs. All concurred, except Kruse, J., who dissented upon the ground that the court erred in charging in effect that the servant assumed the risk of obvious defects.

William Morningstar, Appellant, v. The Lafayette Hotel Company, Respondent.— Judgment and order affirmed, with costs. All concurred, except Robson, J., who dissented.

Margaret Noonan, Respondent, v. Buffalo and Lake Erie Traction Company, Appellant.— Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, that the court committed reversible errors in the reception of evidence. All concurred, except McLennan, P. J., and Foote, J., who dissented.

Sanford Peters, Appellant, v. The McMillan Book Company, Respondent.— Judgment and order affirmed, with costs. All concurred, except Kruse, J., who dissented upon the ground that, although the case is not within the scaffold statute* (no structure was being erected, painted or repaired), the evidence shows that the ladder was an improper appliance for doing the work which the plaintiff was directed to do.

Edward F. Brady, Respondent, v. Eastman Kodak Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

Almira D. Hulbert, Appellant, v. The Village of East Syracuse, Respondent.— Judgment affirmed, with costs. All concurred.

Onondaga County, Respondent, v. Daniel H. Strong and Others, Appellants, Impleaded with Albert C. Phillips, as Executor, etc., of Eliza C. Luther, Deceased.— Order affirmed, with ten dollars costs and disbursements. All concurred, except McLennan, P. J., not voting.

Fanny L. Habicust, as Administratrix, etc., of William F. J. Kreeger, Deceased, Respondent, v. United States Gypsum Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

John Smidt, Respondent, v. Buffalo Cold Storage Company, Appellant.— Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, that the admission of the evidence of the plaintiff's wife as to her physical condition was reversible error. All concurred, except Kruse, J., who dissented.

Thomas J. Crowley, Respondent, v. Sun Insurance Office, Appellant, Impleaded with William Lawton and Harry Blasdell.— Interlocutory judgment affirmed, with costs, with leave to the appellant to plead over within twenty days upon payment of the costs of the demurrer and of this appeal. All concurred.

Buffalo, Lockport and Rochester Railway Company, Respondent, v. John B. Hoyer and Others, Appellants.— Motion for leave to appeal to Court of Appeals granted, and questions for review certified.

* See Labor Law (Consol. Laws, chap. 31; Laws of 1909, chap. 36), § 18.— [REP.]

App. Div.]

Fourth Department, March, 1912.

In the Matter of the Incorporation of the Legal Aid Bureau of Buffalo.—Articles of incorporation approved.

Sarah L. Snow, Plaintiff, v. Charles E. Shreffler, Defendant. In the Matter of the Application to Punish James O. Sebring, Appellant, for Contempt of Court in Said Action.—Motion for reargument denied, with ten dollars costs. All concurred; Foote, J., not sitting.

Guiseppina C. Cianciolo, Appellant, v. Vincenzo Bellanca and Mary Bellanca, Respondents.—Judgment affirmed, with costs. All concurred.

Della Porter, Respondent, v. Eliza J. Sabins, Appellant.—Judgment affirmed, with costs. All concurred.

John W. Welker and Others, as Trustees of School District No. 12 of the Town of Darien, Appellants, v. Andrew J. Lathrop and Henry I. Barber, Respondents.—Judgment affirmed, with costs. All concurred.

Horace H. Potter, Respondent, v. Pennsylvania Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Village of Carthage, Appellant, v. Jay A. Loomis, Respondent.—Judgment affirmed, with costs. All concurred, except Spring, J., who dissented.

Ernest D. Lindley, Respondent, v. Charles A. Campbell, Appellant.—Judgment affirmed, with costs. All concurred, except Kruse and Robson, JJ., who dissented upon the ground that the referee adopted an improper measure of damages.

Leonard C. Kenen, Respondent, v. Superior Axe and Forge Company, Appellant.—Judgment and orders affirmed, with costs. All concurred.

Edward L. Terry, Respondent, v. Albert Gaffey, Appellant.—Judgment and order affirmed, with costs. All concurred.

Isaac Hurley, Respondent, v. Isaac K. Hodges, Appellant.—Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, that the finding of the jury that the defendant agreed to pay twenty-five dollars per acre as commission for the sale of his farm is contrary to and against the weight of the evidence. All concurred; Foote, J., not sitting.

John Feist & Sons Company, Respondent, v. John F. Huber and Others, Impleaded with John W. Powell, Appellant.—Judgment affirmed, with costs. All concurred.

Thomas Brown Contracting Company, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Katherine Ryan, Respondent, v. Corden T. Graham, Appellant.—Judgment and order affirmed, with costs. All concurred.

Genevieve V. Potter, by Carrie R. Potter, Her Guardian ad Litem, Respondent, v. Buffalo, Lockport and Rochester Railway Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Adam Jendraszek, as Administrator, etc., of Boleslaw Kaminski, Deceased, Respondent, v. International Railway Company, Appellant.—Judgment and order affirmed, with costs. All concurred, except Foote, J., who dissented.

The People of the State of New York, Respondent, v. Michael Bevins, Appellant.—Judgment of conviction affirmed. All concurred.

Fourth Department, March, 1912.

[Vol. 149.]

Frank L. Blenis, Respondent, v. Utica Knitting Company, Appellant.—Judgment affirmed, with costs. All concurred.

Everett A. Rexford and Others, Respondents, v. Walter Tanner, Appellant.—Order affirmed, with costs. All concurred.

John Lindner, as Administrator, etc., of William J. Lindner, Deceased, Respondent, v. The Lake Shore and Michigan Southern Railway Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Rochester Hotel Corporation, Respondent, v. Foster & Glidden Engineering Company, Appellant.—Order, so far as appealed from, affirmed, with ten dollars costs and disbursements. All concurred, except Spring and Kruse, JJ., who dissented and voted for modification by limiting the amount of costs imposed to the trial fee and disbursements of the trial, besides costs of the motion.

Michael J. Cummings v. Frederick T. Carrington and Others. Frisbie & Stansfield Knitting Company, Appellant; William Pierson Judson and Others, as Commissioners of Varick Canal, Respondents.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Arthur W. Meyers, Appellant, v. Burdette J. Evans, Respondent.—Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

Charles R. Crosby, Respondent, v. Delos A. Woleben, Appellant.—Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

Enoch Round, Respondent, v. The Niagara Falls Power Company, Appellant.—Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

Emma A. Taylor, as Executrix, etc., Appellant, v. New York Life Insurance Company, Respondent.—Motion for reargument denied, with ten dollars costs.

In the Matter of the Application of the Newark and Marion Railway Company for the Appointment of Commissioners to Determine Whether or Not the Railroad Shall Be Operated under Steam Power.—Report of commissioners confirmed, without passing upon the question as to whether the abutting owners are entitled to compensation for the alleged additional burden placed upon their property. All concurred, except Foote, J., who dissented, upon the ground that the special act* under which this proceeding was instituted is invalid in that it does not provide for compensation to the owners of the fee in Pearl street for the added burden due to the operation of the railroad by locomotive steam power.

Turner Construction Company, Respondent, v. Walter D. Uptegraff, Appellant.—Judgment and order affirmed, with costs. All concurred.

Stanislaw Grzywacz, Respondent, Appellant, v. The New York Central and Hudson River Railroad Company, Appellant, Respondent.—Judgment affirmed, without costs of this appeal to either party. New trial to

* See Laws of 1908, chap. 494.—[REP.]

App. Div.]

First Department, March, 1912.

be had in Justice's Court on the 15th day of April, 1912, at ten o'clock A. M.
All concurred.

Henry C. Walbaum, Respondent, v. James Lockhart, Appellant.—Order affirmed, with costs.

Oscar Boehmer, Respondent, v. International Railway Company, Appellant.—Judgment and orders affirmed, with costs. All concurred.

William H. L. Swan, Respondent, v. Milo E. Woodcock and William S. Woodcock, Appellants.—Order affirmed, with costs. All concurred.

In the Matter of the Probate of the Alleged Last Will and Testament of Margaret Mahoney, Deceased. Wilbur H. Smith and Frank N. Smith, Appellants; George S. Allen, as Executor, etc., of Margaret Mahoney, Deceased, Respondent.—Decree of Surrogate's Court affirmed, with costs. All concurred.

Michael Palma, Appellant, v. Union Fork and Hoe Company, Respondent.—Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

William S. Gottshall, Plaintiff, v. Pennsylvania Railroad Company, Appellant. Gardner Brockway, Respondent, v. Syracuse Lighting Company, Appellant. Phoebe Hatch and Others, Respondents, v. Willis Luckman, Appellant. The People of the State of New York ex rel. William Hatch and Phoebe Hatch, Respondents, v. Cornelius Carpenter and Others, Appellants. In the Matter of the Application of Frederick M. Broadbrooks, as Receiver, etc., for the Removal of William E. Genno and Another from Certain Premises in the City of Buffalo. Martin Luber, an Infant, etc., Appellant, v. William J. Connors, Respondent.—The foregoing cases, having been twice passed upon being reached in their regular order, are dismissed, with costs, under general rule 89.

FIRST DEPARTMENT, MARCH, 1912.

FRANK X. PETTIT, Respondent, v. ALICE B. PETTIT and Others, Appellants. (No. 2.)

Appeal by the defendants, Alice B. Pettit and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York, denying the defendant's motion for a new trial on the ground of fraud and newly-discovered evidence.

PER CURIAM: This appeal is from an order denying a motion for a new trial on the ground of fraud and newly-discovered evidence. The moving papers are insufficient to justify the granting of a new trial on either ground, and for that reason the order appealed from should be affirmed, with ten dollars costs and disbursements. Present—Ingraham, P. J., McLaughlin, Laughlin, Miller and Dowling, JJ. Order affirmed, with ten dollars costs and disbursements.

CASES REPORTED WITH BRIEF SYLLABI.

[Vol. 149.]

First Department, March, 1912.

L. CLARKE, Appellant, v. THE PRECIOUS METALS CORPORATION,
Respondent.

Appeal from part of a judgment entered in the New York county clerk's
on the 21st day of December, 1911, upon a decision after a trial at
Term.

CURIAM: The judgment appealed from should be modified by striking
therefrom all after the word "stockholder," so as to leave in the judg-
ment only a direction to the defendant to transfer the stock. As so modi-
fied the judgment should be affirmed, with costs to the appellant. Present
Ingraham, P. J., Laughlin, Clarke, Scott and Miller, JJ. Judgment
affirmed as directed in opinion, and as so modified affirmed, with costs to the
appellant. Order to be settled on notice.

Matter of Proving the Last Will and Testament
of Wm C.
LESSTER, Deceased.

S T. GRIDLEY, Appellant; WILLIAM C. LESTER, ~~et al.~~, ~~att.~~
Attorney and client—substitution.

Appeal from an order of the Surrogate's Court of the county of New
York, entered on the 15th day of January, 1912, directing a substitution of
attorneys.

CURIAM: The question whether the appellant had misconduct as to justify an unconditional substitution not have been determined on conflicting affidavits. In view of that question the appellant's rights should be protected. We think he will be fully protected by leaving his lien on the respondent's interest in the estate.

The order should be modified so as to direct the referee as to the charges against the appellant and so as to prohibit the substitution of attorneys and the surrender of papers on condition that the appellant retain a lien for the value of his services on the respondent's interest in said estate and on any property or sum of money arising out of or paid to the respondent in settlement of the will. It, however, to the determination of the question whether the appellant has been forfeited for misconduct, and as thus modified the order affirmed, with ten dollars costs and disbursements to the appellant — Ingraham, P. J., Laughlin, Clarke, Scott and Miller, JJ. Judgment affirmed as directed in opinion, and as modified affirmed, with ten dollars costs and disbursements to appellant. Order to be settled on notice.

ETHEL D. WEAVER, Appellant, v. GEORGE WEAVER, Individually and as Surviving Partner of the Late Firm of R. H. & G. WEAVER, and as Executor and Trustee under the Last Will and Testament of REUBEN H. WEAVER, Deceased, Defendant, Respondent, Impleaded with ANNIE E. WEAVER and Others, Defendants.

Appeal from a judgment entered in the New York county clerk's office on the 15th day of May, 1911, after a trial at Special Term, dismissing the complaint upon the merits.

PER CURIAM: The judgment should be modified by striking out all provisions after the dismissal of the complaint, with costs, upon the ground that the decree of the surrogate is a binding adjudication affecting the personal property of the decedent, and as so modified the judgment should be affirmed, without costs. Present—Ingraham, P. J., McLaughlin, Laughlin, Miller and Dowling, JJ. Judgment modified as directed in opinion, and as modified affirmed, without costs. Order to be settled on notice.

THE IMPERIAL GARAGE, Respondent, v. CLARKSON P. RYTTEMBERG and MATHESON AUTOMOBILE COMPANY, Appellants.

Appeal from a judgment entered in the New York county clerk's office on the 8th day of March, 1911, upon a verdict, and from an order entered on the 7th day of April, 1911, denying a motion for a new trial.

PER CURIAM: We think there was a question to be submitted to the jury as to whether the plaintiff was not responsible for the damages caused by the cracked cylinder, and it was, therefore, error to dismiss the counterclaim to that extent. The judgment and order will, therefore, be reversed and a new trial ordered, with costs to appellants to abide event, unless plaintiff stipulates to reduce the judgment as entered to the sum of \$501.09; in which event the judgment as so reduced and the order appealed from will be affirmed, without costs. Present—Ingraham, P. J., Laughlin, Clarke, Scott and Miller, JJ. Judgment and order reversed, new trial ordered, costs to appellants to abide event, unless plaintiff stipulates to reduce judgment to \$501.09; in which event judgment as modified and order affirmed, without costs. Order to be settled on notice.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ROSA HERTZ, Relator, v. THE WARDEN OF THE CITY PRISON OF THE CITY OF NEW YORK, Respondent. (2 cases.)

Habeas corpus—sufficiency of complaint.

Motion to dismiss an appeal.

PER CURIAM: The relator was arraigned before a city magistrate charged with the crime of maintaining a disorderly house. The examination of the relator under this charge was at her request adjourned to February 21, 1912, and she was admitted to bail in the sum of \$2,500. Thereafter, on

First Department, March, 1912.

[Vol. 149.]

February twenty-first, the relator was surrendered by her surety, and was in the custody of the warden of the city prison. Whereupon she sued out a writ of habeas corpus before a justice of the Supreme Court, claiming her discharge upon the ground that the complaint upon which she was arraigned before the magistrate did not state facts sufficient to connect her with the crime charged. The justice of the Supreme Court, before whom the habeas corpus proceeding was had, reserved decision and admitted the relator to bail. Subsequently the writ was dismissed and the relator remanded. On February twenty-ninth an information was filed by the district attorney in the Court of Special Sessions, charging the relator with the crime of maintaining a disorderly house, to which information the relator interposed a plea of not guilty, and the issue raised by that plea has not yet been disposed of. Thus the relator is now held under the commitment of the magistrate dated February twenty-eighth, the information filed by the district attorney in the Court of Special Sessions and the plea thereto. It thus becomes entirely immaterial whether the original charge was sufficient to justify the arrest of the relator under the warrant of the magistrate. The case has been removed from that jurisdiction to the Court of Special Sessions; and if this court should hold that the original arraignment before the magistrate was based upon an insufficient charge, the relator would not be entitled to be discharged, as the subsequent commitment by the magistrate and the arraignment and plea before the Court of Sessions superseded the original warrant of the magistrate. The question, therefore, becomes purely academic and the motion to dismiss the appeal must be granted. Present — Ingraham, P. J., McLaughlin, Clarke, Scott and Dowling, JJ. Appeal dismissed.

JAMES F. KINKADE, Respondent, *v.* LIVE OAK COPPER MINING AND SMELTING COMPANY, Appellant, Impleaded with FREDERICK H. KALDENBERG, as President of the LIVE OAK COPPER MINING AND SMELTING COMPANY, and Others.

Appeal from a judgment entered in the New York county clerk's office on the 26th day of January, 1911, after trial at Special Term.

PER CURIAM: The judgment appealed from is reversed and a new trial granted unless plaintiff stipulates to reduce the judgment from \$2,763.07 to \$1,634.06, and if such stipulation be given, then the judgment appealed from is so modified and as modified affirmed, without costs to either party on this appeal. Present — Ingraham, P. J., McLaughlin, Laughlin, Miller and Dowling, JJ. Judgment reversed and new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as stated in opinion, in which event, judgment as so modified affirmed, without costs. Order to be settled on notice.

App. Div.]First Department, March, 1912.

CENTRAL TRUST COMPANY OF NEW YORK, as Trustee, Plaintiff, v. MANHATTAN TRUST COMPANY, Defendant, Impleaded, etc.

Appeal — reargument — when ordered by court.

Application to resettle an order or for reargument.

PER CURIAM: When the court announced its decision upon this appeal directing judgment to be entered for the plaintiff for the sum of \$200,000, we overlooked the finding of fact that the plaintiff had suffered only nominal damages, and, understanding from the record that the facts were undisputed from which this court found that the plaintiff had suffered damages for that amount, we thought that we could direct the proper judgment to be entered and thus save the parties the expense of another trial. In view, however, of the position taken by the defendant in its brief before the Court of Appeals and the recent decision of that court in *Elliott v. Guardian Trust Co.* (204 N. Y. 212) it would quite plainly appear that this court was in error in directing judgment for the plaintiff rather than directing a new trial. This court cannot make a finding as to the damages, even though the facts are undisputed from which the conclusion of fact that damages were sustained would flow. As, however, the defendant objects to our amending this order without ordering a reargument and as it has not been heard upon the question, the court will, of its own motion, order a reargument of this appeal. Order to be settled on notice. Present—Ingraham, P. J., Clarke, Scott, Miller and Dowling, JJ. Reargument ordered.

LUCIANO RESTREPO and DU RELLE GAGE, Respondents, v. ALFONSO JARAMILLO and Others, Copartners, Doing Business as A. JARAMILLO R. & Co., Appellants.

Attachment — moving affidavits.

Appeal from an order, entered in the New York county clerk's office on the 27th day of February, 1912, denying a motion to vacate an attachment.

SCOTT, J.: The papers upon which the attachment was granted and on which the motion to vacate is based are fatally defective. The action is for unliquidated damages and there is nothing in the papers upon which the court can determine what damages, if any, the plaintiffs are entitled to recover. (*James v. Signell*, 60 App. Div. 75; *Haskell v. Osborn*, 33 id. 128.) It follows that the order appealed from must be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs. Ingraham, P. J., Laughlin, Clarke and Miller, JJ., concurred. Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

SIGMUND GORLITZER, Respondent, v. BETTY WOLFFBERG, as Administratrix, etc., Appellant.

Motion to certify a question to the Court of Appeals for determination.

PER CURIAM: This court on appeal (*ante*, p. 916) affirmed the order appealed from for the reasons stated by Mr. Justice Bischoff in Special

First Department, March, 1912.

[Vol. 149.]

Term. The question certified is: "Does the plaintiff's cause of action survive the death of the sole defendant, it appearing that upon the trial of the action the complaint had been dismissed and judgment entered thereon, but on appeal to this court after the death of the defendant the judgment was reversed and a new trial ordered?" Present—Ingraham, P. J., McLaughlin, Clarke, Scott and Dowling, JJ. Motion granted; question certified.

Gilbert H. Montague, as Receiver of Hotel Gotham Company, Appellant, v. Hotel Gotham Company, Impleaded with John Larkin, Respondent.—Judgment affirmed, with costs. No opinion.

Gilbert H. Montague, as Receiver of Hotel Gotham Company, Appellant, v. Hotel Gotham Company, Impleaded with Fifty-fifth Street Company, Respondent.—Judgment affirmed, with costs. No opinion.

The Gorham Company, Appellant, v. United Engineering and Contracting Company, Respondent.—Order modified by requiring defendant, as a condition for leave to serve amended answer, to pay all costs in the action to date, including costs in this court and in the Court of Appeals, and as so modified affirmed, without costs of this appeal. No opinion. Order to be settled on notice.

The People of the State of New York ex rel. George H. Dyer, Appellant, v. George B. McClellan and Others, Constituting the Board of Estimate and Apportionment of the City of New York and Others, Respondents, Impleaded with James C. Deering.—Judgment and order affirmed, with costs. No opinion.

Ludwig Flocker, as Administrator, etc., of August O. Flocker, Deceased, Appellant, v. The Hudson and Manhattan Railroad Company, Respondent.—Order affirmed, with costs and disbursements. No opinion.

Israel Dunbar, as Administrator, etc., of Annie Dunbar, Deceased, Respondent, v. New York Veal and Mutton Company, Appellant.—Judgment and order affirmed, with costs. No opinion. (Scott, J., dissenting.)

Max Jaffe and Others, Appellants, v. Stephen M. Weld and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements, with leave to plaintiffs to amend on payment of costs. No opinion.

Elisabeth S. Sterry, Appellant, v. James W. Sterry, Respondent.—Order reversed, with ten dollars costs and disbursements, and motion granted to the extent stated in order. No opinion.

Thomas D. Rambaut v. William S. Tevis. George M. Coffin v. William S. Tevis.—Motions denied, with ten dollars costs. Memorandum per curiam. Orders to be settled on notice.

Honora M. Cox, Respondent, v. Carl Jung and E. August Burgtoff, as Executors, etc., of Hugo Kullenberg, Deceased, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Hattie Herrmann, Appellant, v. Frances Steel Company, Impleaded with John L. Murray, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Nathan Burkan, Respondent, v. Musical Courier Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

App. Div.] First Department, March, 1912.

Clarence L. Barber, Appellant, v. Edward W. Davidson, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Otto R. H. Ludewig, Plaintiff, v. Andreas C. Bosselman, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Ruth Lake Bauer, Appellant, v. Eagle Insurance Company of London, England, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Augusta S. Sternberger v. Bernard Perlmutter.—Motion granted, unless appellant complies with terms stated in order.

The People of the State of New York v. Stephen H. Dutton. The People of the State of New York v. James N. De Pretie.—Motion granted, unless appellant complies with terms stated in order.

Matilda Leerburger v. Joseph Polstein. Gennaro Maida v. Adrian H. Joline. Vincenzo Maida v. Adrian H. Joline.—Motions granted, with ten dollars costs.

Caroline D. Sexton v. Albano Goldstein.—Motion denied.

Emile G. Des Jardins v. Walter B. Hotchkin. Caroline J. Taylor v. Nathan H. Heft.—Motions granted, unless appellants comply with terms stated in orders.

Samuel Corn v. Adolph Heymsfeld. St. Stephen's Church v. Andrew Bastine. Michael Kleiner v. Joseph Cohn and Another. (2 cases.) Charlotte W. Bartlett v. James C. Stewart.—Applications denied, with ten dollars costs. Orders signed.

Jacob Diamond v. Herman T. Mendelsohn.—Application granted. Order signed.

Anna Segeritz v. Grand Lodge, etc.—Motion denied, with ten dollars costs.

London Realty Company v. Elizabeth Riordan.—Motion granted.

Nelda M. Talley v. Robert P. Talley.—Motion denied, with ten dollars costs.

Conrad M. Braker v. New York Finance Company.—Motion denied, without costs.

Charles W. Cass v. Realty Securities Company.—Motion granted; questions certified.

William J. Bryon v. Paul Bernstein.—Motion denied, with ten dollars costs.

The People of the State of New York ex rel. Frederick B. Faitoute v. James Creelman and Others.—Order resettled so as to certify that decision was made as matter of law and not in the exercise of discretion. Order to be settled on notice.

Meyer L. Sire v. Edward F. Browning.—Motion granted; time to serve papers on appeal extended until April first. Order to be settled on notice.

Denis J. Shea v. Thomas Linsky. Federal Sign System v. Theodore Soutsos. Paul Shotland v. Delia Mulligan. Vincenzo D'Elette v. Illinois Surety Company.—Applications denied, with ten dollars costs. Orders signed.

In the Matter of Eugene J. Vacheron.—Reference ordered to official referee. Order to be settled on notice.

First Department, March, 1912.

[Vol. 149.]

In the Matter of Noah Loder. In the Matter of Clarence A. Leavitt.— Respondents disbarred. Order to be settled on notice.

In the Matter of Paul M. Abrahams.—Reference ordered to official referee. Order to be settled on notice.

James L. Allen, Appellant, v. William W. Farley, as State Commissioner of Excise of the State of New York, and Thomas F. McAvoy, as Special Deputy Commissioner of Excise for the Boroughs of Manhattan and The Bronx, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Wynkoop Hallenbeck Crawford Company, Respondent, v. Frank deK. Huyler and Others, as Executors, etc., of John S. Huyler, Deceased, Appellants, Impleaded with Thomas J. Gaines, Jr.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Orla Rubsam and Others, Respondents, v. Carl Rudolph Schultz and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Felix Tausend, Respondent, v. Vallandigham B. Baggott and George Ryall, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of Alexander Miller, Deceased.—Order affirmed, with ten dollars costs and disbursements. No opinion.

George G. Goodrich, Appellant, v. Nash Rockwood, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

James R. Keiser, Incorporated, Respondent, v. Kaiser & Company and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Rudolph Cohen, Respondent, v. Sarah F. Cotheal, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

The City of New York, Respondent, Appellant, v. Central Park, North and East River Railroad Company, Appellant. Adrian H. Joline and Douglas Robinson, as Receivers of Metropolitan Street Railway Company, and William W. Ladd, as Receiver of New York City Railway Company, Respondents.—Judgment affirmed, with costs, on plaintiff's appeal to the defendant receivers, respondents, and on the appeal of the defendant Central Park, North and East River Railroad Company, with costs to plaintiff. No opinion.

Walter Harriman, an Infant, by Olivine Kircher, His Guardian ad Litem, Respondent, v. Francis H. Leggett & Company, Appellant.—Judgment and order affirmed, with costs. No opinion. (Ingraham, P. J., dissenting.)

Carscallen & Cassidy, Appellant, v. Moritz Zimmerman and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York, Respondent, v. Charles Rinkel, Appellant.—Judgment affirmed. No opinion.

John Scheier, Appellant, v. Hudson Structural Steel Company, Respondent.—Judgment affirmed, with costs. No opinion.

May Eline, Respondent, v. Charles Eline, Appellant.—Judgment affirmed, with costs. No opinion.

App. Div.] First Department, March, 1912.

Kinston Cotton Mills, Appellant, v. Percival Kuhne and Others, Respondents.— Judgment and order affirmed, with costs. No opinion.

Henry B. Stein, Appellant, v. Charles A. Stein, Respondent, Impleaded with Frederick D. Stein.— Judgment affirmed, with costs. No opinion.

Isaac Steinberg and Leo Falkenberg, Respondents, v. Boston Insurance Company, Appellant, Impleaded with Augusta E. Reese.— Judgment and order affirmed, with costs. No opinion.

The People of the State of New York, Respondent, v. David Michaelson, Appellant.— Judgment affirmed. No opinion.

Sam Fund, Respondent, v. Joseph Spivack, Appellant.— Judgment and order affirmed, with costs. No opinion.

Welch Motor Car Company of New York, Appellant, v. P. Brady & Son Company and First Commercial Bank of Pontiac, Respondents.— Judgment and order affirmed, with costs. No opinion.

John Walsh, as Administrator, etc., of Frank Walsh, Deceased, Appellant, v. Adrian H. Joline and Douglas Robinson, as Receivers of the New York City Railway Company, Respondents.— Judgment and order affirmed, with costs, on the authority of *Flynn v. Joline* (185 App. Div. 291). (Laughlin, J., dissented.)

Seventeenth Street Realty Company, Appellant, v. Jacob Auslander, Respondent.— Judgment affirmed, with costs. No opinion.

John Ferguson, Jr., Appellant, v. R. H. Sellers Company, Respondent.— Order affirmed, with ten dollars costs and disbursements. (Scott, J., dissented.)

The Farmers' Loan and Trust Company, as Receiver of the Property, etc., of Robert Bowne, Deceased, and Elizabeth Bowne, Deceased, Respondent, v. Edward W. Bowne, as Executor, etc., of Robert Bowne, Deceased, and as Executor, etc., of Elizabeth Bowne, Deceased, and Others, Appellants, Impleaded with Jane R. Haines and Others, Respondents, and Others.— Judgment affirmed, with costs. No opinion.

Ellen Hughes, as Administratrix, etc., of Patrick Hughes, Deceased, Appellant, v. Sheffield Farms Slawson Decker Company, Respondent.— Judgment and order affirmed, with costs. No opinion.

Alice Reilly, Respondent, v. William E. Fitz Gerald and The Fitz Gerald Brick Company, Appellants.— Judgment affirmed, with costs. No opinion.

Daniel Rosendorf, Respondent, v. The New York Edison Company, Appellant.— Judgment affirmed, with costs. No opinion.

Robert S. Smith, Respondent, v. Max Rubel, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of Aaron Avrutis.— Stay granted as stated in memorandum per curiam. Order to be settled on notice.

Charles E. Levy, Appellant, v. Louis S. Berg, Respondent.— Judgment and order affirmed, with costs. No opinion.

Cecelia W. Niles, as Administratrix, etc., of William Weston Niles, Deceased, Appellant, v. Leopold Winkler and Others, Respondents.— Judgment and order affirmed, with costs. No opinion. (Laughlin and Dowling, JJ., dissenting.)

First Department, March, 1912.

[Vol. 149.]

R. P. & J. H. Staats, Respondent, v. The City of New York, Appellant.—Judgment and order affirmed, with costs. No opinion.

Fanny J. Kirkwood and Others, as Executors, etc., of Thomas Kirkwood, Deceased, Respondents, v. Harry M. Smith, Individually and as Surviving Partner of C. S. Locke and Smith, and Rodman J. Pearson, Appellants, Impleaded with Cornelia M. Locke, as Administratrix, etc., of Charles S. Locke, Deceased.—Judgment affirmed, with costs. No opinion.

Mutual Coal Company, Respondent, v. H. G. Realty Company, Appellant.—Determination affirmed, with costs, and judgment absolute ordered on stipulation, with costs. No opinion.

Henry F. Turtle and Herbert S. Turtle, Copartners, Doing Business under the Firm Name and Style of Turtle Bros., Respondents, v. Glendinning, McLeish & Company, Ltd., Appellant.—Judgment affirmed, with costs, with leave to defendant to amend answer on payment of costs. No opinion.

The People of the State of New York ex rel. Joseph P. Ward, Relator, v. James C. Cropsey, as Police Commissioner of the City of New York, Respondent.—Writ dismissed and proceedings affirmed, with costs. No opinion.

Belle Brand, Respondent, v. Jacob Glockner, Appellant.—Judgment and order affirmed, with costs. No opinion.

Gerard Beekman, as Sole Surviving Trustee under the Last Will and Testament of James W. Beekman, Deceased (1877), Respondent, v. William Mitchell, Appellant, Impleaded with Cornelia A. Beekman and Others, Respondents.—Judgment affirmed, with costs. No opinion.

George Colon & Company, Respondent, v. East One Hundred and Eighty-ninth Street Building and Construction Company and Others Impleaded with Illinois Surety Compay, Appellant.—Judgment affirmed, with costs. No opinion.

Charles Barsotti, Appellant, v. Fidalma Del Genovese, as Administratrix, etc., of Virgilio Del Genovese, Deceased, Respondent.—Judgment and order affirmed, with costs. No opinion. (Miller, J., dissenting.)

The People of the State of New York ex rel. John F. Ambrose, Appellant, v. Calvin Tomkins, as Commissioner of the Department of Docks and Ferries in the City of New York, Respondent.—Judgment and order affirmed, with costs. No opinion.

In the Matter of the Probate of a Paper Propounded as the Last Will and Testament of Matilda Turner, Deceased.—Decree affirmed, with costs, on opinion on former appeal (142 App. Div. 645). (Ingraham, P. J., and Miller, J., dissenting on former dissenting opinion.)

Joseph Warren, Appellant, v. Siegel-Cooper Company, Respondent.—Judgment and order affirmed, with costs. No opinion.

Mary Lehan, Respondent, v. The Sisters of Charity of St. Vincent de Paul, Appellant.—Appeal dismissed, with ten dollars costs and disbursements. No opinion.

Samuel Tepfer, Respondent, v. Pincus Burger and Others, Appellants, Impleaded with Rival Gas and Electric Fixture Supply Company.—Order affirmed, with ten dollars costs and disbursements. No opinion.

App. Div.]

First Department, March, 1912.

The People of the State of New York v. Ascher Strauss.—Motion granted.

Thomas J. Edwards v. Flora E. Edwards.—Motion granted, without costs.

Meyer L. Sire v. Edward F. Browning.—Motion denied, with ten dollars costs. Memorandum per curiam.

Sadie Lavine v. William L. Lavine.—Motion granted, with ten dollars costs.

Mary A. Apgar v. Ellen Connell.—Motion granted unless appellant complies with terms stated in order.

Bernard Wolowitch v. National Surety Company. (2 cases.)—Application and motion for stay granted. Orders signed.

Frederick A. Richmond v. Clarence T. Birkett. Moe Frank v. The City of New York. Madeline Claussen v. S. O. Pell & Co. Philip P. Carlon v. Francis J. Ryan. (2 cases.) Penelope Kelly v. Lawrence E. Holden.—Applications denied, with ten dollars costs in each case. Orders signed.

Kate Maloney v. Lawrence Holden.—Application denied, with ten dollars costs. Order signed.

Alfred C. Fordon v. Ella Fordon.—Motion denied, without costs.

Hazlitt A. Cuppy v. Stollwerck Bros.—Motion granted on compliance by appellant with the terms stated in order.

Gertrude Skidmore v. Frederick S. Myers.—Motion denied, with ten dollars costs.

Charles F. H. Johnson v. Stanley M. Isaacs.—Motion denied, with ten dollars costs.

Michael Maloney v. Randolph Hurry. David Adler v. Samuel Mayper. John C. Calhoun v. Commonwealth Trust Company.—Motions denied, with ten dollars costs.

New York County National Bank v. James S. Herrman.—Motion for resettlement granted. Order to be settled on notice.

In the Matter of Charles H. Stoddard.—Motion denied. Order to be settled on notice.

In the Matter of Frank A. K. Boland.—Referred to official referee. Order to be settled on notice.

In the Matter of Edward A. McQuade. (2 cases.)—Reference ordered to official referee. Orders to be settled on notice.

In the Matter of Smith Lent.—Reference ordered to official referee. Order to be settled on notice.

In the Matter of Henry M. Heymann.—Reference ordered to official referee. Order to be settled on notice.

In the Matter of August P. Wagener.—Reference ordered to official referee. Order to be settled on notice.

William D. Tyndall, in His Own Behalf, and All Other Certificate Holders of the Defendant Similarly Situated, who Will Come in and Contribute to the Expenses of This Suit, Appellant, v. Pinelawn Cemetery, Respondent, and Others. James P. Haney and Others, Intervenors, Respondents. (2 cases.)—Orders affirmed, with ten dollars costs and disbursements. No opinion. (Clarke and Scott, JJ., dissenting.)

First Department, March, 1912.

[Vol. 149.]

The City of New York, Appellant, v. William R. Hearst, as President of the National Association of Democratic Clubs, Respondent.—Orders affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of Julia L. Butterfield, Individually and as Trustee under the Last Will and Testament of Frederick P. James, Appellant, for Permission to Sell Certain Real Estate. Edmund L. Mooney and Andrew J. Shipman, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Claude M. Johnson, Respondent, v. The Autopress Company and Morris D. Kopple, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Anna Day Ward and Henry L. Poinier, as Committee of All Property within This State of William R. Ward, an Incompetent Person, Respondents, v. Chelsea Exchange Bank, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. (Scott, J., dissenting.)

Emma M. Stokes, Respondent, v. Hartwell Staples, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Selma Mattson, as Administratrix, etc., of Mat Mattson, Deceased, Respondent, v. Phoenix Construction Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

James C. Bushby, Respondent, v. Lancelot M. Berkeley, Appellant. (2 cases.)—Appeal dismissed, with ten dollars costs. Memorandum per curiam.

The People of the State of New York ex rel. National Bank of Commerce, Respondent, v. Lawson Purdy, President, and Others, as Commissioners of Taxes and Assessments of the City of New York, Appellants. Taxes of 1901-1907. The People of the State of New York ex rel. National Reserve Bank, Formerly Known as the Consolidated National Bank of New York, Respondent, v. Lawson Purdy, President, and Others, as Commissioners of Taxes and Assessments of the City of New York, Appellants. Taxes of 1908-1907. The People of the State of New York ex rel. The Coal and Iron National Bank, Respondent, v. Lawson Purdy, President, and Others as Commissioners of Taxes and Assessments of the City of New York, Appellants. Taxes of 1904-1907. The People of the State of New York ex rel. Bank of Metropolis, Respondent, v. Lawson Purdy, President, and Others, as Commissioners of Taxes and Assessments of the City of New York, Appellants. Taxes of 1901-1907.—Orders affirmed, with ten dollars costs and disbursements. No opinion. (Clarke and Scott, JJ., dissenting.)

William Grant Brown, as General Guardian of Margaret Rose Mulvany and Others, Infants, Respondent, v. Mary C. Mulvany, Sr., and Edward P. S. Mulvany, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Giovanni D'Amato and Others, Appellants, v. Morris R. Silverman, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Louis Guenther, Appellant, v. The Ridgway Company, Respondent. (Nos. 1 and 2.)—Orders modified as stated in memoranda per curiam, and as modified affirmed, without costs. Orders to be settled on notice.

App. Div.] Second Department, March, 1912.

William Hepner, Appellant, v. Frances Lillian Hepner, Respondent.—Orders affirmed, with ten dollars costs and disbursements. No opinion. (McLaughlin and Scott, JJ., dissenting.)

Samuel Lipschitz, Respondent, v. Herman Berkovitz and Simon Spiegel, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Emina L. Hall, Respondent, v. Augustus H. Hall, Appellant.—Order modified as stated in memorandum, and as modified affirmed, with ten dollars costs and disbursements to respondent. Memorandum per curiam. Order to be settled on notice.

Harry Kaplan, Appellant, v. Philip Mendetz, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of Nicola Vilarosa, Appellant, for an Order Directing Holmes Jones, Attorney, Respondent, to Pay over Certain Money.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Russo-Chinese Bank, Respondent, v. Evans R. Dick and Others, Appellants. Russo-Asiatic Bank, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

SECOND DEPARTMENT, MARCH, 1912.

CATHERINE SINCLAIR, Respondent, v. SARAH F. SINCLAIR, Appellant,
Impleaded with JOHN F. FOLEY.

Appeal by the defendant from part of a judgment of the Special Term, entered in the office of the clerk of the county of Kings on the 16th day of May, 1911.

PER CURIAM: The finding that the deeds were procured from the plaintiff by fraud and imposition on the part of the defendant and Green is not sustained by the weight of the evidence. Hence, the conclusion of law and judgment so far as based on such finding cannot be sustained. But the evidence does sustain the finding that the plaintiff did not understand or comprehend the nature and purport of the deeds, and never knowingly or voluntarily executed or acknowledged the execution of the same. Therefore, the judgment is reversed and a new trial granted, costs to abide the event, unless the plaintiff shall within twenty days stipulate to modify the judgment so as to provide that the several deeds are void for failure of the minds of the parties thereto to meet for the execution thereof, in which case the judgment as so modified is affirmed, without costs of this appeal. Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ., concurred. Judgment reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to modify the judgment so as to provide that the several deeds are void for failure of the minds of the parties thereto to meet for the execution thereof, in which case the judgment as so modified is affirmed, without costs of this appeal.

Second Department, March, 1912.

[Vol. 149.]

In the Matter of the Application of CHARLES E. AKIN and THOMAS O'BRIEN, Appellants, for an Order Directing the Custodian of Primary Records to Strike Out from His Records Certain Designations of Candidates for Party Nominations and for Election to Party Positions in the County of Putnam. ASBURY C. TOWNSEND, Respondent.

In the Matter of the Application of ASBURY C. TOWNSEND, as Chairman of the Democratic County Committee, Respondent, for an Order Directing the Custodian of Primary Records to File Certain Designations of Candidates for Party Nominations and for Election to Party Positions. SAMUEL B. CRANE, Appellant.

Elections—notice of meeting of county committee.

Appeals by the petitioners, Charles E. Akin and another, and by Samuel B. Crane, respectively, from orders of the Special Term, entered in the office of the clerk of Putnam county on the 12th day of March, 1912.

PER CURIAM: It is conceded that notice of the meeting of the Democratic county committee for the purpose of designating candidates for party nominations was not served upon four persons originally elected as members of that committee as required by the Election Law relating to nominations and primaries. (Laws of 1911, chap. 891.)* As no proceedings to remove the persons so elected as members of such committee have been taken, as required by section 40 of said law,† they were entitled to such notice, and the said meeting was never duly organized. Burr, Thomas, Carr and Woodward, JJ., concurred; Hirschberg, J., dissented, on the ground that as a majority of the committee were present and acted, the failure to notify the four members of the meeting may be disregarded as an informality. In the first proceeding order reversed and application granted, without costs. In the second proceeding order reversed and application denied, without costs.

SAMUEL EPSTEIN, Appellant, v. HYMAN SUSSMAN and Others, Defendants, Impleaded with ABRAHAM EPSTEIN, Respondent. EDWARD GRIBBON & SONS, LIMITED, Respondent.

Mortgage—foreclosure—stay.

Appeal by the plaintiff from an order entered in the office of the clerk of the county of Kings on the 16th day of November, 1911, denying a motion to vacate an order staying proceedings on the part of the plaintiff herein directed towards the obtaining of a personal judgment against the defendant Abraham Epstein.

PER CURIAM: This action appears to be brought for the foreclosure of a mortgage on certain real estate, and the complaint seeks to obtain a deficiency judgment against certain defendants, including the defendant Abraham Epstein. The said defendant is now bankrupt, and the respond-

* See Election Law (Consol. Laws, chap. 17; Laws of 1909, chap. 22), § 47, added by Laws of 1911, chap. 891.—[REP.]

† Election Law, § 40, added by Laws of 1911, chap. 891.—[REP.]

App. Div.] Second Department, March, 1912.

ent Edward Gribbon & Sons, Limited, a creditor of said bankrupt and not a party to the action, obtained from the Special Term in Kings county an *ex parte* order in said action, restraining and staying all proceedings in the action "directed toward obtaining a personal judgment against Abraham Epstein." The plaintiff moved at Special Term for an order vacating and setting aside such *ex parte* order, which motion was made on notice to the creditor, Edward Gribbon & Sons, Limited, and after a hearing the motion was denied. As no grounds are disclosed in the papers on appeal for the granting of the *ex parte* order or for the refusal to vacate it, and as the sole respondent, the creditor at whose instance the stay was granted, has not appeared on the hearing of the appeal or presented a brief, it would seem proper that the order be reversed, with ten dollars costs and disbursements, and the motion to vacate the *ex parte* order granting the stay be granted, with costs. Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ., concurred. Order reversed, with ten dollars costs and disbursements, and motion to vacate the *ex parte* order granted, with costs.

WILLIAM H. COONAN, Respondent, v. HAMBURG-AMERICAN PACKET COMPANY, Appellant. (Appeal No. 1.)

Appeal by the defendant from two orders of the Special Term, entered in the office of the clerk of the county of Kings on the 17th day of October and the 14th day of November, 1911, respectively.

PER CURIAM: While the position of the defendant may be technically correct, in view of the fact that the amended complaint has been served, has been demurred to, and that an appeal from the decision upon that demurrer is now pending before this court, the questions involved on this appeal are academic. Substantial justice may be accomplished by affirming the orders reviewed by this appeal, without costs. If defendant shall within five days procure a retaxation of costs, as directed by Mr. Justice Garretson, and if within five days thereafter the amount of such costs is not paid by plaintiff to defendant, application may be made by defendant to the Special Term to stay all proceedings in this action, or to dismiss the complaint, as it may be advised. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred. Orders affirmed, without costs, in accordance with the provisions of opinion.

Lena Berman, an Infant, by Abraham Berman, Her Guardian ad Litem, Respondent, v. Automatic Vending Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Joseph Bloch, Appellant, v. James Macbeth and Others, Respondents.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., not voting.

Hyman Cohen, Appellant, v. Louis Loketz and Joseph B. Finkel, Respondents, Impleaded with David Zubuloff and Mina Basin, Defendants.—Order affirmed, with ten dollars costs and disbursements. No

Second Department, March, 1912.

[Vol. 149.]

opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Alfred P. Delcambre, Sr., Appellant, v. Marie H. Delcambre and Others, Defendants, Impleaded with the City of Mount Vernon, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Grand Lodge, Knights of Pythias, Eastern and Western Hemispheres of the State of New York, Incorporated, Respondent, v. John E. Myers, Incorrectly Described as "James E. Myers," Chancellor Commander of Excelsior Lodge No. 6 of the Knights of Pythias, Consisting of More than Seven Members, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

Frank W. Hebbard, Respondent, v. New York and Queens County Railway Company, Appellant.—Judgment and order of the County Court of Queens county unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Anthony Huber, Appellant, v. Joseph Marinaccio and Others, Respondents.—Judgment of the County Court of Kings county affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ., concurred.

Selma M. Laarson, as Administratrix, etc., of Alexander Laarson, Deceased, Respondent, v. Julia E. Cameron, Doing Business under the Trade Name of "A. S. Cameron Steam Pump Works," Appellant.—Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., dissented upon the ground (1) that a finding that other and different appliances than those furnished by defendant for shifting belts were in common and general use in connection with such machinery as was here employed, is against the weight of the evidence, and (2) upon the further ground that plaintiff's intestate assumed the risk of the employment.

The People of the State of New York ex rel. Frederick Massolles and Katherina Massolles, Appellants, v. Joseph P. Hennessy and Others, Composing the Board of Assessors of the City of New York, Respondents.—Order affirmed, with ten dollars costs and disbursements, on the opinion of Mr. Justice Kapper at Special Term. (Reported in 74 Misc. Rep. 166.) Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

Hyman Quartin, Appellant, v. Samuel Goldstein and Others, Respondents.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

Frank L. Wing, Respondent, v. Samuel F. Edmead, Appellant.—Judgment and order of the County Court of Kings county affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ., concurred.

Thomas Beirne, Respondent, v. Joseph Ravitch and Others, Appellants.—Motions for reargument or for leave to appeal to the Court of Appeals denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

App. Div.] Second Department, March, 1912.

George M. Clyde, Appellant, v. Brooklyn Union Elevated Railroad Company, Respondent.—Motions denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Mary Davies, Plaintiff, v. Barnet Teplisky and Others, Defendants. Elizabeth M. Brooks, Appellant, v. Joseph Zuckert, Respondent.—Motion to resettle order granted, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Robert Dooling, an Infant, by Agnes Dooling, His Guardian ad Litem, Appellant, v. The City of New York, Respondent.—Motion for leave to appeal to the Court of Appeals denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Mary C. Flynn and Others, Appellants, v. John C. Judge, Respondent.—Motion to resettle order granted, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

John J. Gordon, Respondent, v. Law Reporting Company, Appellant.—Motions denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

In the Matter of the Mechanic's Lien Filed by Keshin, Blitstein & Company against Beckerman Construction Company, etc.—Appeal dismissed, with ten dollars costs and disbursements. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

In the Matter of the Application of Leo J. Lambert for Admission to the Bar.—Application granted. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

In the Matter of the Application of the Village of Bronxville for a Writ of Certiorari Directed to Frank W. Stevens and Others, as Commissioners, etc., to Compel Acceptance by The New York Central and Hudson River Railroad Company of Notice of Appeal, etc.—Motion to compel acceptance of notice of appeal denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

In the Matter of Jennie Perkins Williams, an Alleged Incompetent Person.—Motion denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

The Long Island Railroad Company, Respondent, v. Mary T. Mulry and Others, Appellants.—Motion denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Nicolina Macioce, as Administratrix, etc., Appellant, v. William A. Johnston, Respondent.—Motion for leave to appeal to the Court of Appeals denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Daniel McMullen, Respondent, v. John Arbuckle and Another, Appellants.—Motion for reargument or for leave to appeal to the Court of Appeals denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Herman J. Meyers, Respondent, v. North American Watch Company, Appellant.—Motion granted, without costs, and order modified by striking out the provision for a new trial. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Second Department

Richard H. Murphy, Appellant, v. Respondents, Impleaded with J. F. Motion to dismiss appeal granted, with costs. Hirschberg, Thomas, Carr and Woodward.

Fanny B. Newbery, Appellant, v. John, Respondents.—Motion denied on costs, perfect her appeal, place the calendar, and be ready for argument granted, with ten dollars costs. Present—Thomas, Carr and Woodward, JJ.

Ignacio Caligola Pennica, Respondent, Western Railroad Company, Appellant without costs. Present—Jenks, P. J. Woodward, JJ.

Fred J. Pollock, Respondent, v. Q. Appellant.—Motion granted, without costs. Hirschberg, Thomas, Carr and Woodward.

The People of the State of New York, Plaintiff, v. Daniel Moynahan, as Collector of the City of New York, Appellant.—Motion denied. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward.

Edward A. Richards, Respondent, v. T. Motion for leave to appeal to the Court of Appeals—Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

John D. Stem, Respondent, v. Benjamin. Motion granted, without costs. Present—Thomas, Carr and Woodward, JJ.

William E. White, Respondent, v. Appellants.—Motion for reargument denied. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward.

Alexander G. Whitelaw, as Trustee, et al. and Another, Respondents.—Motion denied that appellant within twenty days perfect his appeal to the next calendar and be ready for argument granted, with ten dollars costs. Hirschberg, Thomas, Carr and Woodward, JJ.

Frederick Winckler and Another, a. Louis Winckler, Individually and as Executrix, v. Estate of E. Motion for leave to appeal to the Court of Appeals—Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward.

John Callahan, Appellant, v. Andrew, Respondents.—Judgment dismissing plaintiff's action affirmed. It is held that the questions of defendants' negligence and contributory negligence were questions for the jury; and upon the stipulation of the parties, the favor of the plaintiff is reinstated and thereon, with costs to plaintiff, the appellate court. Present—Jenks, P. J., Hirschberg, Burr, Woodward.

App. Div.]

Second Department, March, 1912.

Reinhold W. Daust, Respondent, v. Fred Figge, Appellant.—Judgment and order of the County Court of Kings county reversed and new trial ordered, costs to abide the event, for error in the rulings of the court at folios 72-75. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Louis Davis, an Infant, by Gus Davis, His Guardian ad Litem, Respondent, v. The City of New York, Appellant.—Order affirmed, with costs. No opinion. Hirschberg, Woodward and Rich, JJ., concurred; Jenks, P. J., and Burr, J., dissented.

John Deis, Respondent, v. Theodore B. Bohr, Appellant.—Judgment and order of the County Court of Rockland county unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

John J. Donohue, Respondent, v. Theophilus Gilman, Appellant.—Judgment of the County Court of Kings county unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

William W. Hannan, Respondent, v. Florence A. McCain, Appellant.—Judgment and order of the County Court of Westchester county reversed and new trial ordered, costs to abide the event, for error in the ruling on the questions of evidence presented at folio 48. Jenks, P. J., Burr, Thomas and Carr, JJ., concurred; Hirschberg, J., dissented.

In the Matter of the Application of Lillie B. Cornish, Respondent, for the Appointment of Commissioners to Assess the Damages to Her Property, Resulting from a Change of Grade of Broadway and Voorhis Avenue in the Village of South Nyack, Rockland County, N. Y., Appellant.—Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ., concurred.

In the Matter of the Probate of the Last Will and Testament of Ellen Haggerty, Deceased, etc.—Appeal dismissed by default, with costs. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

William H. Mohrmann, an Infant, by Minnie L. Scharff, His Guardian ad Litem, Respondent, v. Metropolitan Hotel Supply Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Florence E. Moore, Appellant, v. The City of New York, Respondent.—Order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ.

John Muller, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ.

The People of the State of New York, Respondent, v. Michael Calabrese, Appellant.—Judgment of conviction of the County Court of Westchester county reversed for error in the reception of evidence to prove the general reputation of the house (*People v. Mauch*, 24 How. Pr. 278; *People v. Hulett*, 15 N. Y. Supp. 630, 631), and new trial ordered. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

Metta Schroeder, Respondent, v. George H. Young, Jr., and Frederick

Second Department, March, 1912.

[Vol. 149.]

Plage, Composing the Firm of Young & Plage, Defendants, Impleaded with Peoples Surety Company of New York, Appellant.—Judgment unanimously affirmed, with costs. No opinion. Present—Hirschberg, Burr, Thomas, Woodward and Rich, JJ.

Michael Schuhman, an Infant, by George Schuhman, His Guardian ad Litem, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Order setting aside verdict and granting new trial unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Thomas and Carr, JJ.

Town of Pelham, Appellant, v. John M. Shinn, Respondent.—Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., not voting.

The Trust Company of America, Plaintiff, v. Constance C. Garrison, and Conde Nast, as Trustee, Appellants, Impleaded with Sophie Marchais La Grave, Respondent, and William R. Garrison and Others, Defendants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Thomas and Carr, JJ., concurred.

The Trustees of the Freeholders and Commonalty of the Town of Brookhaven, Respondent, v. The Port Jefferson Milling Company, Appellant.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

Joseph Biehl, Respondent, v. The Erie Railroad Company, Appellant.—Motions denied, without costs. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

August Bohnhoff, Respondent, v. Henry C. Fischer, Impleaded, etc., Appellant.—Motion to resettle order granted, without costs. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

Zealey Cohen, by His Guardian ad Litem, Respondent, v. New York Times Company, Appellant.—Motion so far as it asks leave to file brief on appeal granted, without costs; otherwise denied. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

Antonia Di Napoli, as Administratrix, etc., Appellant, v. Edward F. Lathrop and Another, Respondents.—Motion for leave to appeal to the Court of Appeals granted, without costs. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

Daniel B. McCoy, Respondent, v. Gas Engine and Power Company and Another, Respondent. Joseph A. Flannery, Appellant.—Motion denied, without costs, on the ground that the same is prematurely made. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

The People of the State of New York, Respondent, v. John E. Schultz, Appellant.—Motion for leave to appeal to the Court of Appeals denied, without costs, on the ground that permission is unnecessary. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

Michael J. Dady, Respondent, v. The City of New York, Appellant.—Judgment unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Thomas, Woodward and Rich, JJ.

In the Matter of the Application of Mauritz W. Hoglund, Respondent, to Compel William H. Griffin, an Attorney, Appellant, to Pay over Funds.

App. Div.] Second Department, March, 1912.

— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

In the Matter of the Protest, etc., against the Petition Filed by George W. Salter and Others, etc.— Order affirmed, without costs. No opinion. Hirschberg, Burr, Thomas, Carr and Woodward, JJ., concurred.

In the Matter of the Objections of Charles E. Smith to the Independent Democratic Certificate, Filed under the Emblem of "Sunrise over the Horizon," etc.— Order affirmed, without costs. No opinion. Hirschberg, Burr, Thomas, Carr and Woodward, JJ., concurred.

The People of the State of New York ex rel. Leonard Crozier, Relator, v. William F. Baker, as Police Commissioner of the Police Department of the City of New York, Respondent.— Writ of certiorari dismissed and determination of respondent dismissing relator from the police force of the city of New York confirmed, with fifty dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ., concurred.

The Sentinel Printing Company, Respondent, v. William N. Marcy, Defendant, Impleaded with James H. S. Fair, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present— Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Isaac Slater, Appellant, v. Michaelino Shimko, Respondent.— Order affirmed by default, with ten dollars costs and disbursements. Hirschberg, Burr, Thomas, Carr and Woodward, JJ., concurred.

Town of Oyster Bay, Respondent, v. Emil J. Stehli, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

Emma Von Munchow, Respondent, v. Eliza A. Morton, Appellant.— Order affirmed, with ten dollars costs and disbursements, and motion denied, without costs. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

In the Matter of Maurice F. Propping, an Attorney.— These proceedings will be dismissed provided that the attorney within ten days pay, without conditions by him, \$125 (conceded by him to be due and which he has previously offered to pay), without prejudice to the respective claims of the parties against each other. By this decision the court does not intend any reflection upon the good faith or integrity of the attorney. Hirschberg, Burr, Carr and Woodward, JJ., concurred; Thomas, J., is of opinion that the \$125 should be paid unconditionally, without prejudice as to the balance; that the matter should not be determined in this proceeding, which should be dismissed.

In the Matter of the Appeal by the Village of Bronxville, Appellant, from a Decision and Determination of the Public Service Commission, etc., of a Petition of the New York Central and Hudson River Railroad Company, Respondent, as to the Elimination of a Grade Crossing in Said Village, etc.— Motion denied, without costs. Present — Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

In the Matter of Henry L. Preston, Respondent, v. Jacob Tuck, Appellant.— Motion for leave to present the appeal upon the original stenographer's minutes and the exhibits, denied, without costs. Motion for

Second Department, March, 1912.

[Vol. 149.]

stay denied, without costs, on condition that the respondent file a bond to secure the appellant in the sum of \$1,500, and thereupon the appellant deliver to the respondent all papers and documents upon which appellant asserts a lien, execute all necessary consents to the payment of all moneys belonging to the respondent which are withheld on account of any asserted lien; all without prejudice to the lien, if any. Otherwise, motion for stay granted, with ten dollars costs. Present—Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ.

In the Matter of the Application of George H. Rice, for Admission to the Bar.—Application granted. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

The People of the State of New York, Respondent, v. Giuseppe Elefanto, Appellant.—Motion denied, on condition that the appellant perfect his appeal forthwith, place the case on the calendar and be ready for argument when reached; otherwise, motion granted. Present—Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ.

Fred J. Taber, Respondent, v. The City of New York, Appellant.—Motion denied, without costs. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ.

Henry H. Creighton, Respondent, v. Carlson Automobile Company, Appellant.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Ruth Follinsby, an Infant, by Olivia Follinsby, Her Guardian ad Litem, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Bertha Fox and Pauline Lewkowitz, Appellants, v. Ella B. Bainbridge, as Executrix, etc., of Maria Louise Beeckman, Deceased, Known Also as Louise M. Beeckman, and Others, Defendants, Impleaded with Thomas H. Beeckman, Respondent.—Judgment and order of the County Court of Kings county affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Woodward and Rich, JJ., concurred; Burr, J., not voting.

The People of the State of New York ex rel. Henry W. Bavendam, Relator, v. William F. Baker, as Police Commissioner of the City of New York, Respondent.—Determination annulled as contrary to the weight of evidence, and relator reinstated, with fifty dollars costs and disbursements. Jenks, P. J., Hirschberg and Carr, JJ., concurred; Thomas and Rich, JJ., voted for confirmation.

Henry Hirschberg, Respondent, v. John L. Kruger, Appellant.—We think that the Special Term should have relieved the defendant from his default, which was due to excusable inadvertence, and that the defendant should have a hearing upon the merits as presented by the record. The order is reversed, without costs, and the motion to open the default granted, upon payment of ten dollars costs and plaintiff's disbursements on account of the entry of judgment and the proceedings thereon. The judgment must stand as security, or in lieu thereof the defendant may file within ten days a proper bond to secure the plaintiff. The motion for a

App. Div.] Second Department, March, 1912.

stay is dismissed, without costs. Jenks, P. J., Carr and Woodward, JJ., concurred; Thomas, J., dissented.

Home Trust Company of New York, Respondent, v. Georgia L. Collins and Others, Defendants, Impleaded with Orlando S. Richards and Others, Appellants.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Caleb J. S. Horton, Respondent v. Carlo Petrillo, Jr., Also Known as Carlo Petrillo, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

In the Matter of the Application of the New York, Westchester and Boston Railway Company, Respondent, to Acquire Title to Real Property of Selina Weeks, Appellant.—Order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Abraham Lachmann and Jacob Lachmann, Respondents, v. The People of the State of New York and Others, Defendants, Impleaded with Kate M. Brookfield, Appellant.—Final judgment and order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

James McGough, Respondent, v. The City of New York, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Thomas, Carr and Rich, JJ.

Rodman J. Pearson, Appellant, v. William L. Reed and "Mary" Reed, Wife of William L. Reed, the Name "Mary" Being Fictitious, Respondents.—Judgment reversed, without costs, and case remitted to the Special Term for formal decision. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

The People of the State of New York, Respondent, v. Daniel Merritt, Appellant.—Judgment of conviction of the County Court of Westchester county reversed and new trial ordered, for errors committed on the trial, as shown at folios 40, 79 and 100 of the record. Thomas, Carr and Rich, JJ., concurred; Jenks, P. J., and Hirschberg, J., dissented, upon the ground that the errors were not capital.

The People of the State of New York ex rel. Charles E. Victory, Jr., Respondent, v. Allen N. Spooner, as Commissioner of the Department of Docks and Ferries of the City of New York, Appellant.—Final order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Ingefrid Ramstrom, Plaintiff, v. Barnes Manufacturing Company and John Magner, Defendants.—Plaintiff's exceptions overruled, and judgment directed for the defendants, dismissing the complaint, with costs, on the ground that there is no proof in the record that the driver of the truck in question was in the employment of the defendants. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

Harry C. Schlappendorf, Respondent, v. American Railway Traffic Company, Appellant.—Order affirmed, without costs. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

Lamar B. Seeley, Appellant, v. Andrew B. Hammond, Respondent.—

Second Department, March, 1912.

[Vol. 149.]

Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr and Woodward, JJ., concurred; Rich, J., dissented.

William R. Ware and Others, Respondents, v. Isabel Hicks and Evelyn Weed, Appellants.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ., concurred.

Charles H. Webb, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Judgment reversed and new trial granted, costs to abide the event, upon the ground that the issues should have been submitted to the jury. Thomas, Carr and Rich, JJ., concurred; Jenks, P. J., and Hirschberg, J., dissented.

Frank W. Hebbard, Respondent, v. New York and Queens County Railway Company, Appellant.—Motion for leave to appeal to the Court of Appeals denied, without costs. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

In the Matter of Effingham L. Holywell, an Attorney.—Motion granted. Eugene Lamb Richards, Jr., appointed referee, and Conrad S. Keyes appointed as attorney to prosecute. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

In the Matter of Joseph Martin, an Attorney.—Motion granted. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

Siegmund Nathan, Respondent, v. William H. Woolverton, as President of the New York Transfer Company, Appellant.—Motions denied, without costs. Present—Hirschberg, Burr, Thomas, Carr and Woodward, JJ.

William H. Coonan, Respondent, v. Hamburg-American Packet Company, Appellant. (Appeal No. 8.)—Interlocutory judgment affirmed, with costs, with leave to defendant to answer within twenty days. No opinion. Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ., concurred.

Michele de Cristofano, Respondent, v. Alfonso Risolo and Rosa Risolo, His Wife, Appellants.—Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

William K. Dickerson, Respondent, v. Philip M. Musica, Appellant.—Appeal dismissed, with costs, on the authority of *Loper v. Wading River Realty Co.* (148 App. Div. 167). Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ., concurred.

Pietro Dilluvio, Respondent, v. New York and Queens County Railway Company, Appellant, Impleaded with the City of New York.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Woodward and Rich, JJ.

Samuel Felberbaum and Louis Goldstein, Respondents, v. Jacob Bronstein and Benjamin Stern, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, Burr, Thomas, Carr and Woodward, JJ., concurred.

Daisy Green, Respondent, v. Albert L. Green, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

App. Div.] Second Department, March, 1912.

Charles Hauserman, Respondent, v. Henry Weismann, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

Robert Hurley, an Infant, by Robert J. Hurley, His Guardian ad Litem, Appellant, v. Winant B. Wardell, Respondent.—Judgment unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Thomas and Woodward, JJ.

Robert J. Hurley, Appellant, v. Winant B. Wardell, Respondent.—Judgment unanimously affirmed, with costs. No opinion. Present—Jenks, P. J., Hirschberg, Burr, Thomas and Woodward, JJ.

Aina Johnson, an Infant, by Joel Johnson, Her Guardian ad Litem, Respondent, v. The Nassau Electric Railroad Company, Appellant.—Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Thomas, Carr and Woodward, JJ., concurred; Rich, J. taking no part.

Norwegian Lutheran Trinity Church of Brooklyn and Vicinity, Appellant, v. Meyer Krelsovitch, Respondent, Impleaded with Patrick H. Quinn, as Sheriff of Kings County, Defendant.—Judgment reversed and new trial granted, costs to abide the event, on the ground that the evidence presented by the plaintiff was sufficient to make out a *prima facie* case. Jenks, P. J., Burr, Thomas, Carr and Woodward, JJ., concurred.

Fitzhugh Smith, Appellant, v. Thomas P. Peters and Others, Doing Business under the Firm Name and Style of B. Peters & Co., Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Hirschberg, Thomas, Carr and Woodward, JJ., concurred.

Tomassina Spila, as Administratrix, etc., of John Spila, Deceased, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order reversed upon reargument, and new trial granted, costs to abide the event, on the ground that plaintiff was guilty of contributory negligence as matter of law. Jenks, P. J., Thomas, Carr and Rich, JJ., concurred; Woodward, J., dissented.

Charles F. Stehlin, Respondent, v. The City and County Contract Company, Appellant.—Interlocutory judgment overruling demurrer affirmed, with ten dollars costs, with leave to defendant to withdraw demurrer and answer the complaint within twenty days, on payment of costs and disbursements on appeal, as well as the costs specified in the interlocutory judgment. No opinion. Jenks, P. J., Thomas, Carr, Woodward and Rich, JJ., concurred.

George W. Vroom, Respondent, v. Arthur C. Nellis, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, Burr, Thomas, Carr and Woodward, JJ., concurred.

Elsa Wittgren, as Administratrix, etc., of Nies Bernhard Wittgren, Deceased, Respondent, v. Wells Brothers Company of New York, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, on the authority of *Wittgren v. Wells Brothers Co.* (141 App. Div. 698). Jenks, P. J., Woodward and Rich, JJ., concurred; Burr, J., concurred in the result, on the ground that the verdict is contrary to the weight of evidence; Hirschberg, J., dissented.

INDEX.

ACCORD AND SATISFACTION.

Action to recover moneys from depositary.
See BAILMENT.

ACCOUNT STATED.

Action to recover moneys from depositary.
See BAILMENT.

ACCOUNTING.

Examination of defendant before trial.
See DISCOVERY, 2.

Effect of fraudulent concealment upon limitation of action at law.
See EQUITY, 1.

Action for contribution by partner—accounting and settlement as defense.

See PARTNERSHIP.

Separately stating and numbering causes of action.
See PLEADING, 7.

ADVERSE POSSESSION.

Computation of period.
See PARTITION, 1.

AGENCY.

See PRINCIPAL AND AGENT.

ANNULMENT.

Former husband living—comity—decree of foreign State dissolving marriage—conflict of judgment.
See HUSBAND AND WIFE, 2.

APPEAL.

1. *When decision law of case on new trial.* Where on an appeal from a judgment in a negligence action it was held that the relation of master and servant did not exist between the defendant and the person who was responsible for the accident, it is the law of the case on a new trial if the proof on that issue is substantially the same. *Casey v. Davis & Furber Machine Co.*, 423.

2. *Effect of affirmance without opinion.* An affirmance by the Appellate Division of an order vacating an order is not a decision that part of the opinion of the court below was correct, if other grounds existed for vacating the order. *Uvalde Asphalt Paving Co. v. City of New York*, 491.

3. *Motion for leave to renew motion on additional papers.* An application for a reargument and for a rehearing of a former application for leave to reinstate portions of an answer on additional papers is in effect a motion for leave to renew the motion on additional papers and is appealable. *City of New York v. Montague*, No. 2, 601.

4. *Order denying new trial—absence of exceptions—weight of evidence—theory of trial.* On an appeal from an order denying a motion for a new trial the Appellate Division may, notwithstanding absence of exceptions, consider the weight of evidence and the question as to whether the case was tried upon a wrong theory. *Spencer v. Hardin*, 667.

5. *Dismissal of complaint—failure to except.* Where, after a disagreement of the jury, a defendant delayed applying for a dismissal of the complaint and an order of dismissal was made nearly fifty days after trial, the Appellate Division will review the facts on an appeal by the plaintiff from a judgment entered on an order of dismissal, although there is no exception to the order. *Shaferv. New York Life Insurance Co.*, 797.

APPEAL—Continued.

6. Reversal of judgment of Justice's Court—evidence—“impression” of witness. A judgment of a Justice's Court should not be reversed on the sole ground that the justice of the peace refused to strike out testimony of the defendant as to his “impression” relating to the delivery of certain goods, where such “impression” was derived from the defendant's recollection of the facts.

If, however, an “impression” is merely an inference, or is not derived from a recollection of the facts and is so slight as to render it probable that it may have been derived from others, or may have been some unwarrantable deduction of the witness' own mind, it is not admissible in evidence. *Tichnor Brothers, Incorporated, v. Barley*, 871.

Time cannot be extended.

Hamilton v. Mendham, 607.

When reargument ordered by court.

Central Trust Co. v. Manhattan Trust Co., 941.

Direction of proper judgment in equity suit.

See CORPORATION, 1.

Review of discretion of trial court.

See DAMAGES.

Action against attorney for negligence—evidence—damages—liability of attorney for advising client to testify falsely.

See DECEDENT'S ESTATE, 1.

Inconsistent findings.

See LIEN, 4.

Negligence—new trial—submission of case on erroneous theory.

See NEGLIGENCE, 6.

Partition—reversal on specific issue—when judgment in action of ejectment *res adjudicata*.

See PARTITION, 1.

Evidence in record on former appeal—judicial notice by Appellate Division.

See TRIAL, 2.

ASSIGNMENT.

Assignment of stock certificate—certificate not negotiable instrument.

See CORPORATION, 4.

Transfer of assets by debtor—assumption of debts by assignee—election of creditor.

See DEBTOR AND CREDITOR, 2.

Mechanic's lien—priority.

See LIEN, 6.

Action to recover balance due on paving contract—right of officers of corporation after dissolution to assign claim.

See MUNICIPAL CORPORATION, 6.

Right of assignee of moneys due bankrupt to intervene in action by trustee to recover the same.

See PRACTICE, 3.

Enforcement of trust—action by assignee of beneficiary.

See TRUST, 3.

ATTACHMENT.

Effect of judgment for defendant—effect of stay—when additional security cannot be required. Where a final judgment is rendered in favor of a defendant, a warrant of attachment issued against it in the action is wholly annulled, unless there be a stay of proceedings suspending the annulment, or the warrant is revived by the reversal or vacating of the judgment.

Hence, after final judgment for the defendant, the court has no power to require the plaintiff to give further security for damages which may be

ATTACHMENT—Continued.

sustained by reason of the attachment, where the annulment thereof has not been suspended as aforesaid. *Flick v. Wyoming Valley Trust Co.*, 546.

Sufficiency of moving affidavits.
Restrepo v. Jaramillo, 941.

ATTORNEY AND CLIENT.

Injunction restraining payment of amount in controversy — execution — sheriff — duty to hold funds — liability for acts of deputies. Conant, an attorney, was enjoined during the pendency of an action brought against him and a third person by Casanova, a former client, or until the entry of an order of the court, from paying over to the codefendant or any other person the sum of \$5,000, which was the amount in controversy. While Conant was so enjoined an attempt was made to attach the sum in an action by his codefendant against Casanova and another, and a levy was made upon the money in controversy in the possession of Conant. Thereupon Conant filed with the sheriff a copy of the injunction order and notified him that he had no other property subject to the attachment. Judgment was entered in the first action and subsequently the plaintiff recovered judgment in the second action. The sheriff received \$5,000 from Conant under the first judgment, and when execution was issued upon the judgment in the second action Conant notified the sheriff in writing that said execution could not be satisfied out of funds in his hands, giving the same reasons as in his former notice.

Held, that Conant should not be compelled to pay the same amount a second time in satisfaction of the judgment secured while he was enjoined from paying it over to any one; that his notice to the sheriff of the existence of the injunction and that he only had one fund belonging to his former client relieved him from liability.

It was the duty of the sheriff to have held the fund until the ownership thereof could be determined.

A sheriff is charged with notice of matters of record in his office and with the acts of his deputies.

Even though a sheriff acts through different deputies in two actions, his knowledge and responsibility are the same. *Shea v. Conant*, 588.

Substitution of attorneys.

Matter of Lester, 988.

Action for negligence.

See DECEDENT'S ESTATE, 1.

Construction of power of attorney.

See INSURANCE, 3.

BAILMENT.

Action to recover moneys from depositary — evidence not showing accord and satisfaction — account stated. Action to recover a balance of moneys deposited with the defendants to be accounted for by them. Evidence examined, and *held*, insufficient to establish an accord and satisfaction, and that the jury would have been justified in finding that the plaintiff was not indebted to the defendants.

The rendition of an account does not make an account stated, and the failure to object only raises a presumption which may be rebutted by proof of any circumstances tending to a contrary conclusion. *Kent v. Wilson*, 841.

Pledge of jewel by agent — title of pledgee.

See REPLEVIN.

BANKING.

When notice to officer of trust company notice to corporation.

See BILLS AND NOTES, 4.

Section 314, Banking Law — usury.

See CRIME, 3.

BANKRUPTCY.

Transfer of assets of insolvent corporation.

See DEBTOR AND CREDITOR, 2.

BANKRUPTCY — *Continued.*

Bankruptcy of mortgagor — appointment of receiver — rights of trustee in bankruptcy stay — remitting action to Federal court.

See MORTGAGE, 1.

Action by trustee to recover money due on contract — right of bankrupt's assignee to intervene.

See PRACTICE, 8.

BILL OF PARTICULARS.

See PLEADING, 1.

Specific performance.

See PLEADING, 4.

When bill sufficient.

See PLEADING, 9.

BILLS AND NOTES.

1. *Action by holder — deposit with holder of amount of note by indorser to secure collection — real party in interest.* Whether as between an indorser and the holder of a note the latter has been secured or paid is no concern of the maker in an action on the note beyond the inquiry whether he may become liable to different persons for the same debt and encounter the danger of paying it twice.

The holder of a note with which an indorser had deposited the full amount thereof as security for its collection may maintain an action against the maker thereof, and it is error to dismiss the complaint on the ground that plaintiff, having been paid, was not the real party in interest. *People's National Bank v. Rice*, 18.

2. *Purchase of draft on faith of statement that acceptance was secured — general assignment by drawer — failure of drawee to accept — equitable right of payee to security — when draft works assignment of particular fund — submission of controversy — statement of facts.* Plaintiffs purchased a draft on a drawee in the Republic of France, being induced thereto by a statement of the drawers that the drawee had promised to accept the draft upon the security of another draft drawn by the same parties upon a drawee in Italy, who was indebted to them for goods sold. The Italian draft was sent to the drawees in France and the drawee in Italy was notified thereof. Before the French draft was presented the drawers made a general assignment for the benefit of creditors, whereupon the drawees in France refused to accept and returned the Italian draft to the assignee without presenting it for payment in Italy. Both the plaintiffs and the assignee made claims upon the debtor in Italy, who thereupon paid the money to the assignee subject to a determination as to the plaintiffs' right thereto.

Held, that in equity the purchase of the French draft upon the drawee's promise to accept it, coupled with the drawer's promise to secure the drawee, entitled the purchaser to the promised security upon the failure of the drawees to accept;

That the Italian draft upon a drawee whom the plaintiffs were informed was indebted to the drawers was intended as security and, in effect, created a lien or charge upon the drawee's debt;

That in equity the assignee of the drawers held the funds received from their debtor in trust for the plaintiffs, who were entitled thereto.

While a draft drawn upon the general credit of the drawer with the drawee does not operate as an assignment of a particular fund, even though one to which the draft is to be charged is indicated, yet where it is the intention of parties that the draft shall be paid out of a particular fund and not absolutely and at all events, it operates as an assignment of the fund.

On a submission of a controversy upon an agreed statement of facts the court cannot choose between conflicting inferences which are permissible, but must confine its decision to the facts stated. *Muller v. Kling*, 176.

3. *Action by executor of payee against maker — partial defense — burden of proof — parol evidence to vary terms of note.* Where, in an action by executors against the makers of a promissory note payable to the plaintiff's testatrix, the answer alleges as a partial defense that at the time of

BILLS AND NOTES — *Continued.*

the execution of the note the payee held another note made by the defendants, the amount of which was included in the note in suit, but upon which they had paid a sum of money which was to be credited on the new note, the burden of proving the partial defense is upon the defendants.

It seems, that an oral agreement made by the parties at the time of the execution of a promissory note, is not admissible to vary the terms of the note. Orange County Trust Co. v. Miller, 292.

4. Transfer after maturity — corporation — ultra vires — accommodation paper — principal and agent — when notice to officer of trust company notice to corporation — facts not showing scheme to defraud corporation — when treasurer of business corporation not authorized to sign negotiable paper — implied authority, when question of fact. Where a promissory note is transferred after maturity the maker when sued by the transferee may take all defenses available against the transferor.

A business corporation has no power to issue or indorse for the accommodation of others promissory notes in which it has no interest.

Where the note of a corporation made for the accommodation of a third person is transferred after maturity, the transferee in order to hold the maker must show that his transferor was a holder for value in good faith before maturity.

A trust company which at the instance of its vice-president, who was an active member of its investment committee, accepts a promissory note, is chargeable with his knowledge that it was made by a business corporation for the accommodation of a third person.

The rule that notice to such officer is not notice to his corporation if he is engaged in a scheme to defraud his company for the benefit of himself and others, does not obtain where it appears that when at the time he induced the corporation to take the note he did not know of its invalidity as corporation accommodation paper.

Evidence in an action upon an accommodation note made by a business corporation examined, and *held*, that the court was justified in finding that although an officer of a trust company having induced his company to discount the notes, afterwards converted the proceeds which were to go to an indorsee, he had no previous intention to defraud his corporation.

It seems, that the mere fact that a negotiable instrument is signed by an officer of a corporation does not of itself prove his authority to issue the instrument.

The by-laws of a business corporation conferred authority only on its president to sign negotiable paper. Evidence examined, and *held*, insufficient to show a waiver of the by-law so as to give the treasurer of the corporation implied authority to sign the paper.

Though it appears that the treasurer of such corporation had made other notes like the one in suit, that fact alone is not sufficient to charge the corporation with liability on the note as a matter of law. At most the acquiescence of the corporation in the signing of promissory notes by its treasurer contrary to the by-laws raised a question of fact as to his authority to do so. *Jacobus v. Jamestown Mantel Co.*, 356.

5. Defenses — fraud of payee — knowledge of transferee, when question for jury — credibility of witness. Action by the transferees of a promissory note against the maker who as a defense alleged that the payee procured the execution of the note by fraud, of which the plaintiffs had knowledge and that they gave no consideration for the transfer. Evidence examined, and *held*, that the question as to whether the plaintiffs were holders in due course should have been submitted to the jury and that the direction of a verdict for the plaintiffs was error.

In such action testimony by the transferees as to the consideration they paid for the note is not conclusive if the jury by accepting the defendant's testimony might deem the plaintiffs unworthy of belief; and this is so although the credibility of a party is no longer a question for the jury merely on account of his interest. *Schwartz v. Goin*, 496.

6. Replevin to recover possession of notes — fraud and deceit — contributory negligence as defense. In a suit for replevin to recover possession of three notes made by the plaintiff to the order of its president and by him indorsed and delivered to the defendant M., the plaintiff's evidence tended to show that the notes were delivered to M. to be by him

BILLS AND NOTES—Continued.

transferred to a third party, while the defendant's evidence tended to show that the notes were given to M. for services. M. indorsed and delivered two of the notes to defendant C., who claims to be a holder in due course for value. Plaintiff testified that M. obtained possession of the notes by fraud and deceit.

Held, that under the evidence a judgment awarding C. possession of the two notes should be affirmed but the judgment giving defendant M. possession of the third note should be reversed.

Contributory negligence is not a defense to an action for fraud and deceit.

A person who is negligent in reposing confidence in a wrongdoer is not thereby prevented from recovering his property from the latter. *Hudson Iron Co. v. Mershon*, 556.

7. Pleading—bill of particulars—action against payee as indorser—lack of diligence in presenting check for payment—burden of proof—bill of particulars denied. A bank which has received a check drawn on another bank and has credited the amount to the account of the payee who withdrew the same, and which seeks to hold the payee as an indorser after the dishonor and protest of the check is under the burden of showing presentation of the check to the drawee within a reasonable time.

Hence, the answer of such indorser alleging that the plaintiff did not use due diligence in presenting the check for payment raises no new issue, and he will not be compelled to give a bill of particulars of the defendant's lack of diligence or to make his answer more definite and certain in that respect. *Knickerbocker Trust Co. v. Miller*, 685.

BRIBERY.

Bribing another to commit perjury.

See CRIME, 2.

BROKER.

Action for commissions—agreement to secure loan.

See CONTRACT, 11.

Agreement to carry stock for customer.

See CONTRACT, 12.

Action against real estate broker—judgment on pleadings.

See PRACTICE, 2.

Insolvency of broker selling stock on the exchange—rights of owner.

See PRINCIPAL AND AGENT, 4.

Factor and broker distinguished.

See PRINCIPAL AND AGENT, 5.

Action for commissions upon sale of bonds.

See PRINCIPAL AND AGENT, 6.

BURGLARY.

Grand larceny—possession of property as evidence of guilt—refusal of defendant to testify.

See CRIME, 4.

CARRIER.

Interstate commerce—Carmack amendment—liability of initial carrier for loss—connecting carrier—uniform bill of lading—inspection of property—refusal of consignee to accept goods—conversion. Before the passage of the Carmack amendment to the Hepburn Act, unless an initial carrier by contract agreed otherwise, its liability for goods received for transportation ceased upon safe delivery to the first connecting carrier.

The effect of the Carmack amendment as to interstate shipments was to make connecting carriers the agents of the initial carrier the same as if it had contracted for through carriage to the point of destination, and to render the initial carrier liable for all loss, damage or injury to the property while *en route*.

Where the rights of a shipper and carrier are not regulated by agreement, the consignee has a right to inspect the goods before accepting them.

The use of the uniform bill of lading is not obligatory upon either shipper or carrier, but if it is adopted as the agreement of the parties and less or

CARRIER — *Continued.*

damage occurs by reason of a breach by a connecting carrier, the initial carrier is liable.

The Carmack amendment does not make an initial carrier liable for conversion because a connecting carrier, which has the custody of the goods, permits them to be inspected by the consignee or any one else.

Where, however, a shipper and carrier use the uniform bill of lading, which provides that inspection of the property covered thereby will not be permitted by the carrier unless provided by law or unless permission is given in writing by the shipper, the initial carrier is liable for damage caused to the property by an inspection permitted by a connecting carrier in violation of the terms of the bill of lading.

Where apples were shipped under a uniform bill of lading and no permission for an inspection was given by the shipper, the initial carrier is not liable in conversion because a connecting carrier permitted the consignee to inspect them, if it is shown that the apples were not in anyway injured by the inspection.

This is so, although the consignee after the inspection refused to accept the apples which had been sold under an oral contract insufficient under the Statute of Frauds.

Without regard to the Carmack amendment or the uniform bill of lading, conversion does not lie for an unauthorized inspection of goods at the point of destination.

It seems, that if property is sold by the carrier without authority so that it asserts title in hostility to the claim of the shipper an action for conversion lies. *Earnest v. Delaware, Lackawanna & W. R. R. Co.*, 330.

Negligence — damage to freight.

Bistany v. Fargo, 929.

CERTIORARI.

1. *Record — omission of return — remedy where return defective.* A record in the Appellate Division on certiorari directed to the Public Service Commission and to a public service corporation should contain the return of the latter as well as that of the Commission.

The remedy of the relator if the return were defective or contained improper matter was a motion for a further return, and in the absence of such motion the return cannot be excluded from the record. *People ex rel. New York Edison Co. v. Wilcox*, 671.

2. *Municipal corporation — certiorari to review dismissal of policeman in city of New York — evidence — uncorroborated testimony of girl of immoral character.* Certiorari to review the action of the police commissioner of the city of New York in dismissing a patrolman on the charges that he left his post and entered certain premises for reasons other than the performance of police duty; that he violated a rule of the police department in failing to report such action; that he failed to take proper action upon finding a young girl in the premises which he entered. Evidence upon the trial before the deputy police commissioner examined, and held, that the determination should be reversed and a new trial directed.

In order to sustain such charges there must be positive evidence of each material element of the offense.

The uncorroborated testimony of a girl of immoral character and habits is entitled to very little weight. *People ex rel. Leonard v. Cropsey*, 730.

3. *Municipal corporation — certiorari to review proceedings of board of supervisors in removing county superintendent of highways from office — Highway Law construed — plans and specifications for town highways — malfeasance defined.* Certiorari to review the proceedings of a board of supervisors in removing a county superintendent of highways, pursuant to section 80 of the Highway Law, for malfeasance in office by reason of the receipt by him of moneys from a town for the preparation of plans and specifications for the improvement of a highway. Evidence examined, and held, that, although the county superintendent may have misconceived his rights, he should be reinstated.

Malfeasance is the doing of an act which is positively unlawful or wrongful, and in order to justify the removal of a county superintendent of highways must affect his performance as such officer. Thus, a misconception of his rights affords no ground for a conclusion of malfeasance.

CERTIORARI—Continued.

It seems, that he may not voluntarily perform such services and thereby create a charge against the town.

No absolute duty rests upon the county superintendent of highways to prepare and furnish plans, specifications and estimates for the repair and improvement of strictly town highways, but he may in a proper case decline to do so and call upon the highway commissioner to provide the same. *People ex rel. Seaman v. Cocks*, 883.

Reviewing action of board of assessors—damages for change of grade.

See EMINENT DOMAIN.

CITY.

See MUNICIPAL CORPORATION.

CODE OF CIVIL PROCEDURE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxi.]

CODE OF CRIMINAL PROCEDURE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxii.]

CODE OF PROCEDURE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxi.]

COMMERCIAL PAPER.

See BILLS AND NOTES.

CONDEMNATION.

See EMINENT DOMAIN.

CONFFLICT OF LAWS.

Validity of bequest made by resident of this State—bequest for charitable use, when valid—bequest in trust to French theological school—effect of French statute disestablishing institution—when trust does not fail—inability of trustee to take—trust administered by Supreme Court. The validity of a bequest of personal property located here made by a resident of this State is to be determined by the laws of this State.

A bequest of personal property in trust to be used for free scholarships in an incorporated theological school situated in the Republic of France is a legal bequest for charitable use under the law of this State.

Such bequest does not fail because of the fact that prior to the death of the testatrix the so-called Separation Law of France was passed whereby the beneficiary was disestablished and ceased to be a government institution, if in fact it continued to exist under said act as an independent school of theology maintaining scholarship students.

Neither does the trust fail because of the fact that the foreign institution may not be entitled to take legal title as trustee under the French law, for equity will not allow a trust to fail for want of a trustee.

Under the circumstances the trust fund will be administered by the Supreme Court of this State and the proceeds transmitted to the foreign beneficiary. *Matter of Miller*, 118.

Lex contracti—presumption that common law is in force in foreign country—judicial notice of treaty.

See CONTRACT, 15.

Effect of foreign decree dissolving marriage—force and effect of erroneous New York decree.

See HUSBAND AND WIFE, 2.

CONSOLIDATED LAWS.

[For table containing all sections cited in this volume, see *ante*, p. lvii.]

CONSPIRACY.

Examination of party before trial.

See DISCOVERY, 1.

CONSTITUTIONAL LAW.

Printing name of candidate more than once on ballot.

See ELECTION LAW, 2.

CONSTITUTIONAL LAW — *Continued.*

Statute authorizing State Commissioner to appoint local health officer.
See PUBLIC HEALTH, 1.

Police power — coloring oleomargarine.
See PUBLIC HEALTH, 2.

Repeal of statute by implication — taxation of railroad for improvement of streets passing under it.
See RAILROAD, 6.

[For tables of the sections of the United States and New York Constitutions cited and construed in this volume, see *ante*, p. lvi.]

CONTEMPT.

Supplementary proceedings — recitals in order.
See DEBTOR AND CREDITOR.

CONTRACT.

1. *Agreement to advance money to corporation — provision for appointment of lender's nominees to office — enforcement of contract — definiteness.* Where a person agreed in consideration of a transfer to himself of over eighty per cent of its stock to advance to a West Virginia mining company sufficient money to redeem its property from a foreclosure sale and to furnish other money as required from time to time to operate its mines until they should yield sufficient returns to pay for working them, a provision in the contract that after the redemption of the property the secretary and treasurer of the company would resign and the directors would appoint the individuals nominated by such person to the vacant positions and that a stockholders' meeting would then be called and a new board of directors elected is not a vital part of the contract and does not destroy its validity so as to constitute a defense to an action by the company to recover damages for its breach.

Such provision is merely incidental and was for the benefit of the individual who did not have to avail himself of it if he did not desire to do so.

Nor was the contract to advance so much money as would put the mines in a condition "to pay for working and operating the same" so indefinite as to render it unenforceable. *San Remo Copper Mining Co. v. Moneuse*, 26.

2. *Building contract construed — action by contractor on quantum meruit — damages — offset by owner — interest — right of owner to cancel contract — waiver of time of performance.* The plaintiff, a construction company, entered into a contract with the defendant to erect a building to be completed on a certain date; in default thereof the plaintiff was to pay the defendant a certain sum as liquidated damages for each day thereafter until the building was completed. The contract contained the usual provisions that should the contractor fail to perform its agreement, the owner should be at liberty, on such failure being certified by the architect, after three days' notice in writing to the contractor, to provide the necessary labor or materials at the expense of the contractor. The contract also provided that the owner should be at liberty to terminate the employment of the contractor and to take possession of and complete the work, should the architect certify that the neglect or failure of the contractor constituted sufficient ground for such action. The defendant after an alleged failure of the plaintiff to perform served notice that he would take possession for the purpose of completing the work, but he failed to obtain the architect's certificate, thereby rendering the notice ineffectual. The defendant thereafter forcibly ejected plaintiff and took charge of the work. Plaintiff acquiesced in such action and filed a mechanic's lien for the materials furnished and work performed less the amount received from the defendant and brought an action to recover upon a *quantum meruit*.

Held, that where an owner in effect cancels a contract and the contractor acquiesces therein, the contract no longer governs, and is to be resorted to only to determine how long the contractor was in default in completing the work;

That, in such a case, the owner is entitled to offset against the contractor's claim the general damages which he sustained by the loss of the

CONTRACT — *Continued.*

use of the building between the day when it was to be completed and the day the owner took charge of it in its uncompleted condition;

That the owner is not entitled to recover the liquidated damages since he acquiesced in the continuance of the work by the contractor after the time for completion by demanding through his architect a greater degree of energy and expedition and since he never gave the contractor notice to complete the work within a reasonable time.

The claim of a contractor on *quantum meruit*, being unliquidated and incapable of determination by market values or an arithmetical calculation, interest cannot be allowed.

An owner has a common-law right to cancel a contract after the contractor, without fault on the part of the owner, fails to perform within the time specified for performance or within the time to which by mutual agreement performance has been extended.

Where the time of performance has been waived and the contractor has been permitted to fully perform, the owner cannot interpose the failure of the contractor to perform within the time required as a defense to the action to recover the contract price of the work, but he may counterclaim his damages or sue therefor by an independent action. *General Supply & Construction Co. v. Goelet*, 80.

8. Municipal corporation — mistake in bid — failure of bidder to execute contract — damages — section 420 of New York charter — liquidated damages — bond accompanying bid — liability of surety same as that of principal — municipal ordinance — judicial notice — right of city to pass ordinances — costs — extra allowance. Where a statute fixes liquidated damages for the breach of a contract with a municipality, it can recover only the statutory damages for a breach in the absence of fraud or mistake; the amount of actual damages sustained is immaterial.

Thus, where the bidder on a municipal contract in New York city deposited, at the time of making its bid, a certified check in a certain sum, as required by section 420 of the Greater New York charter, which provides, among other things, that if a bidder whose bid has been accepted shall refuse to execute the contract awarded to him, the amount of the deposit required by the section shall be retained by the city as liquidated damages, the city which in its instructions to bidders had required the deposit, can recover for the bidder's failure to execute the contract after it had been awarded to it, only the amount of the deposit, in the absence of proof of fraud on the part of the bidder.

Where a bidder made a mistake in its figures of which it informed the city on the day following the opening of the bids, and at that time requested to be relieved of its bid, the city is limited to a recovery of the damages fixed by the charter.

The purpose of requiring the deposit with the bids was not only to insure good faith on the part of the bidders, but also to indemnify the city against the expense of readvertising and to notify bidders of the amount of damages they would have to pay if they refused to enter into the contract after it had been awarded to them.

It seems, that if the bidder on a municipal contract makes an unintentional mistake in its bid, it can withdraw the same before it is acted upon, and a court of equity can relieve the bidder from executing a contract it never intended to make.

When a principal discharges his full obligation his surety is also discharged.

An agreement by a surety to pay any sum for which his principal is not liable is without consideration.

Thus, where the bidder pursuant to the instructions given by the city delivered with its bid the surety company's bond to indemnify the city against damage by the bidder's failure to do what it was legally obligated to do and whereby the surety agreed that if the contract was awarded to the bidder it would become its surety for the faithful performance of the same, and that if the bidder should refuse to execute the contract, it would pay the city the difference between the sum to which the bidder would be entitled upon the completion of the contract and the sum the city should be obliged to pay to the one to whom the contract should be awarded on a reletting, the city cannot recover damages from the surety beyond those specified in section 420 of the charter.

CONTRACT — *Continued.*

The bond was only enforceable to the extent to which the principal was liable to the city.

It is immaterial that the check which the bidder had deposited at the time of making his bid had been returned to him by the city.

The power of a city to pass an ordinance is derived from its charter, and an ordinance in so far as it is inconsistent with the charter is void.

The provisions of section 420 of the charter are conclusive as to the amount of damages for a breach of the contract, and the city by ordinance cannot require the bidder to accompany his bid with an undertaking to the effect that if the contract should be awarded to him and he should fail to execute it, he and his surety should be liable to the city in a greater amount than that fixed by said section.

The action by the city to recover of the bidder and the surety the damages fixed by the bond is not so difficult and extraordinary as to justify an extra allowance of costs to the successful defendants. *City of New York v. Seely-Taylor Co.*, 98.

4. Building contract — substantial performance. Substantial performance of a contract to supervise the erection of a dwelling house is performance, the only deviations permitted being minor, unimportant, inadvertent and unintentional.

Thus, one alleging substantial performance of such contract cannot recover where, as found by the jury, his failure to require the installation of the plumbing system called for by the specifications deprived him of the right to recover nearly twenty-five per cent of his commissions. *Gompert v. Healy*, 198.

5. Offer and acceptance — expression of intention — when offer question for jury — breach — damages — reversal for failure to allow nominal damages — substantial damages — evidence — profits — losses — measure of damages — evidence of damage. The question as to whether a statement of intention by parties negotiating a contract and the attending circumstances are such as to authorize the other party to act upon them as an offer is a question of fact for the jury.

If the statement of intention by the promisor is susceptible of more than one meaning, it should be interpreted in the sense in which he had reason to expect that it was understood by the promisee, and this also is a question for the jury.

Action for the breach of an alleged contract whereby the defendants agreed to withdraw from the active solicitation of business in a foreign country in favor of the plaintiff, their former agent, who had been acting for them there. Evidence examined, and held, that the question as to whether the alleged contract was made should have been submitted to the jury with instruction that if they found the agreement they should find at least nominal damages, the breach being conceded.

A judgment will not be reversed merely to enable the plaintiff to recover nominal damages if the judgment does not estop him as to other interests.

But where it is apparent that had the proper legal rules been applied substantial damages for breach of contract could have been recovered on proper proof, a judgment will be reversed for a failure to award nominal damages so that the plaintiff may have an opportunity to prove substantial damage.

Where it is apparent that substantial damages have been caused by breach of contract defendants cannot escape liability merely because the damage cannot be ascertained exactly. In order to approximate the damage speculative elements may be considered and the jury may indulge in reasonable conjectures and probable estimates arising from the proof.

But the proof of substantial damage must be such as supports such reasonable conjectures and probable estimates and the damages must be such as were reasonably within the contemplation of the parties directly traceable to the breach and not the result of intervening causes.

The damages for such breach may include losses suffered and probable profits prevented.

The measure of damages is the value of the contract at the time of the breach, to be determined upon relevant antecedent and subsequent facts, not, however, on opinion evidence.

While damages must be certain not only in their nature but as respects the cause from which they proceed, they need not be shown with mathe-

CONTRACT — Continued.

matical certainty, but only with such reasonable certainty as serves as a basis for the ordinary conduct of human affairs.

In order to show damages for the breach of the contract aforesaid plaintiff should have been allowed to prove the general nature of the business from which the defendants agreed to withdraw, how it was conducted by them, that after the breach he acted for another company which dealt in the same commodities, to what extent he was able to procure business from the defendants' former customers and to what extent he could secure business after the breach by the defendants. *Stevens v. Amsinck*, 220.

6. Sale—building contract—agreement to furnish materials—abandonment of work by contractor—cancellation of contract—completion by owner—materialman not limited in recovery to contract price. Where plaintiff agreed to provide a contractor with the materials necessary for building a cottage for a fixed price, payment to be guaranteed by the owner, and the latter, upon the abandonment of the work by the contractor, canceled his contract with him and notified the plaintiff thereof, at the same time ordering material to be delivered for the completion of the cottage which he himself finished, the plaintiff is entitled to recover from the owner the value of the materials furnished after the cancellation of the building contract and is not limited to the amount named in the agreement with the contractor.

Inasmuch as the owner never attempted to hold the contractor to the performance of his contract, or to obtain damages from him and inasmuch as he undertook to do the work through his own employees and formally canceled the contract, giving plaintiff notice thereof, he did not complete the work under the contract. *Wood Manufacturing & Realty Co. v. Thompson*, 253.

7. Breach—liquidated damages—pleading—failure to allege non-payment—burden of proof. Where a copy of a contract is annexed to a complaint and referred to therein, the provisions are deemed to be incorporated in the pleading.

Where a contract employing the plaintiff as a designer and superintendent of a dressmaking establishment at a certain sum per week, with an additional percentage of the net profits of the employer, further provided that either party making a breach of the agreement should pay to the other the sum of \$10,000 as and for liquidated damages and not as a penalty, the liquidated damages may be recovered.

On a breach of a contract the general rule is that damages shall be allowed to extend to just compensation for the injury actually sustained. But even though the contract expressly provides in terms for liquidated damages, if it be clear from the sum mentioned and the subject-matter that the principle of compensation has been disregarded, the courts are not controlled by the words used.

Where from the nature of the contract the actual damages for breach are uncertain and by their nature difficult to ascertain with certainty, the parties may provide for liquidated damages.

In determining whether the sum mentioned in a contract is a penalty or liquidated damages, not only the words of the contract, the subject-matter and the sum mentioned may be considered, but also the surrounding circumstances.

As the contract aforesaid provided for liquidated damages, in an action at law the plaintiff's entire recovery for a breach is limited to the sum mentioned.

A complaint to recover liquidated damages on the breach of a contract fails to state a cause of action if it fails to allege non-payment.

When a complaint for the breach of a contract alleges non-payment the allegation is not put in issue by a general denial; the defense of non-payment must be affirmatively pleaded and the defendant is under the burden of proving the same. *Posner v. Rosenberg*, No. 2, 272.

8. Agreement to furnish information on which recovery on a judgment may be secured. An estate of which the defendant was executor held a judgment against a certain company which became insolvent and was dissolved and its property sold by a receiver, including that upon which the judgment was a lien. Plaintiff's brother also held a judgment against the same company and after the receiver's sale brought an action to test

CONTRACT — *Continued.*

the lien of his judgment, and the Court of Appeals sustained his contention that the receiver's sale was subject to the judgment liens.

Immediately thereafter the plaintiff entered into a written contract by the terms of which the defendant agreed to pay the plaintiff one-half the amount recovered on the judgment held by the estate, providing such recovery was the result of facts and information furnished by the plaintiff to the attorney for said estate. The full amount of the judgment was thereafter recovered through the information imparted by the plaintiff and his attorneys, and the property was purchased by the defendant, but before the time to redeem expired a mortgage on the property, known to the defendant to be a prior lien, was foreclosed, thereby cutting off defendant's rights under the execution sale. In an action upon the contract,

Held, that the rights of the plaintiff thereunder were in no manner affected by the mortgage foreclosure or sale thereunder and that a dismissal of the complaint was error. *Coleman v. McClenahan*, 299.

9. *Agreement to drive piles — no mutual mistake as to nature of material filling cribs — mistake of one party only — recovery on contract — estoppel to deny terms of contract.* Action by a contractor to recover for extra work necessitated by the fact that he was required to drive certain piles through cribs filled with stone instead of cribs filled with earth. The plan upon which the bid was made showed the existence of cribs and the spaces between the timbers thereof contained the word "earth." It appeared that the existing cribs in order to resist lateral pressure under the circumstances would have to have been filled with stone. The plans did not purport to be a complete representation of the work to be done, but only to show the number of piles to be driven. The plaintiff had been invited to inspect the premises.

Held, that the plaintiff could not recover for extra work done upon the ground of mutual mistake as to the nature of the crib filling, but under the circumstances was bound to investigate and ascertain the situation for itself.

Especially is this so where the memorandum for bidders stated merely that the information given by the blue prints was all that was "available," and that the typical "crib" foundation shown was only that found at a single boring, and in effect that the nature and extent of the cribs was not determinable.

The plaintiff contended that said memorandum to bidders had not been delivered to him by the defendant's engineer. Evidence examined, and *held*, that a finding that the memorandum had not been delivered was against the weight of evidence.

Moreover, the existence of said memorandum for bidders showing defendant's lack of knowledge of the nature of the crib work of itself refuted the plaintiff's claim of mutual mistake of fact.

To recover because of a mutual mistake of fact it must be shown that both parties to the contract were mistaken.

Where the plaintiff pleaded the contract and has recovered thereon it is estopped from asserting that there was no meeting of the minds on all its terms. *Monks & Sons v. West Street Improvement Co.*, 504.

10. *Pleading — remedy for indefiniteness of complaint — forfeiture.* Defendant and plaintiff's assignor entered into a contract, whereby, in payment for certain stocks and bonds, the former agreed to pay to the latter a certain sum and to procure a conveyance of fifteen acres of land to be selected by the latter out of a larger tract owned by a third party, and whereby defendant agreed in default in procuring such conveyance to pay the plaintiff's assignor a certain sum in lieu thereof.

The complaint of the assignee alleged that the defendant paid the sum mentioned in the contract but failed to cause the conveyance to be made or to pay the sum in lieu thereof, that plaintiff demanded of the defendant that he convey to her fifteen acres of said land, that defendant failed to comply with the demand, that thereafter her assignor caused fifteen acres to be selected and that notice of such selection was served upon the defendant. *Held*, that the complaint was not demurable because it failed to state the time when said demands were made; that the fact that the complaint was indefinite in this respect is a defect to be cured by motion.

CONTRACT — *Continued.*

The plaintiff or her assignor did not necessarily incur a forfeiture by failing to make a selection within either a reasonable or a stated time. *Jacocks v. Morrison*, 558.

11. *Agreement to secure loan — action for commissions — performance by plaintiff and breach by defendant — evidence.* The plaintiff in an action for commissions alleged that he was employed by the defendant to secure a loan of \$50,000 "more or less," to be secured by its first mortgage bonds under certain terms and conditions; that he had performed his part of the contract, but that defendant failed to keep and wrongfully repudiated and broke the agreement, and that plaintiff was thereby damaged in the sum of \$20,000. The answer was in effect a general denial. A recovery was allowed upon the theory that plaintiff procured one S., who was willing to loan \$50,000 to the defendant on the terms upon which the plaintiff was employed to procure it, and that he tendered a certified check to the defendant but that it was refused.

Held, that under the evidence plaintiff failed to establish a cause of action; that defendant had withdrawn its proposition before there was an unqualified acceptance thereof by S., who was unwilling to make the loan unconditionally. *Von Bayer v. Ninigret Mills Co.*, 578.

12. *Agreement to receive and carry stock — evidence.* Action to recover a sum alleged to have been expended by plaintiffs' testator for the defendant under an agreement to receive and carry for the defendant certain shares of stock. Evidence examined, and *held*, that plaintiffs established a *prima facie* case and that the court erred in dismissing the complaint. *Kridel v. Bloomingdale*, 605.

13. *Action on quantum meruit for services in assisting in organization of bank — evidence.* The plaintiff, in an action on a *quantum meruit* to recover for services, alleged that he was employed by the defendant and its agents to assist in the organization of the defendant's bank and the reorganization of its predecessor and that he was promised an official position with the reorganized bank. The defendant denied that it ever employed the plaintiff. Evidence examined, and *held*, insufficient to support a verdict for the plaintiff.

A letter written to the bank by the plaintiff long after the transactions in question, not being in response to any communication from the bank, was a self-serving document and inadmissible in evidence. *Abel v. National Reserve Bank*, 710.

14. *Construction — ambiguity — province of court and jury — construction dependent upon facts aliunde.* Where a contract is ambiguous, the ambiguity should not be construed in favor of the person who wrote it.

Where in order to construe a contract it is necessary to examine facts *aliunde* in connection with the writing, the construction is a mixed question of law and fact to be submitted to the jury under proper instructions. But as a general rule the construction of the written instrument is a question of law for the court.

Thus, where by the terms of a contract it is a question as to whether a defendant who had agreed to raft second-hand timber and piles required him also to raft certain long wooden platforms, the construction in this respect should be submitted to the jury and the verdict should not be set aside. *Staten Island Shipbuilding Co. v. Spearin*, 854.

15. *When lex contracti controls — foreign law — presumption that common law is in force — judicial notice of treaty.* Where, in an action by an employee of the defendant, a German steamship company, to recover for personal injuries, alleged to have been caused by reason of a defective windlass, the defendant admits the employment of the plaintiff and his injury under circumstances which would render the defendant liable except for certain provisions of the German law which are pleaded, the statement of the provisions of the foreign law must be deemed a statement of issuable facts and a motion by the defendant to compel a reply should be granted.

In the absence of proof of what the foreign law is, our own law will be followed.

A presumption that the common law is in force where the transaction occurred is indulged in by our courts only in reference to England

CONTRACT — *Continued.*

and those of our sister States which have taken the common law from England.

It seems, that where the performance of a contract made in Germany for services on a vessel is to commence at Hamburg but is not to be completed until the return of the vessel to that port, the *lex loci contractus* will control.

The court may take judicial notice of a treaty between the United States and Germany. *Schweitzer v. H. A. P. A. Gesellschaft*, 900.

Accord and satisfaction — account stated — evidence.

See BAILMENT.

Uniform bill of lading — inspection of property.

See CARRIER.

Action to recover from decedent's estate for services.

See DECEDEDENT'S ESTATE, 2.

Support and maintenance of wife by husband — reduction of amount of alimony.

See HUSBAND AND WIFE, 4.

Request by infant to pay premium on insurance policy — action against infant on promise to repay.

See INSURANCE, 1.

Construction of power of attorney.

See INSURANCE, 8.

Action to recover money — *res adjudicata* — rights accruing subsequent to prior judgment.

See JUDGMENT.

Contract of employment — construction — right of employee to hearing before discharge.

See MASTER AND SERVANT, 2.

Contract of employment — action for wrongful discharge.

See MASTER AND SERVANT, 7.

When subagent cannot bind his principal by contract of employment.

See MASTER AND SERVANT, 8.

Paving contract construed — notice to contractor to make repairs — sufficiency.

See MUNICIPAL CORPORATION, 6.

Action on several contracts — separately stating causes of action.

See PLEADING, 1, 2.

Cancellation of contract with general agent by insurance company — action for breach.

See PRINCIPAL AND AGENT, 1.

Rescission — action against undisclosed principal — election of remedy.

See PRINCIPAL AND AGENT, 3.

Action by factor for damages resulting from discharge — construction of contract — right to commissions.

See PRINCIPAL AND AGENT, 5.

See SALE.

CONTRIBUTION.

Action to recover part of mutual debt paid by one party.

See PARTNERSHIP.

CONVERSION.

Sale of property by carrier — claim of title in hostility to shipper.

See CARRIER.

Trust — death of life beneficiary — receiver in supplementary proceedings against remainderman — action against trustee for conversion.

See TRUST, 1.

CORPORATION.

1. *Religious corporation — contract to convey land — leave of court — specific performance — damages — deposit on contract — equitable lien — sale to other persons — appeal — judgment.* At common law a religious corporation could not sell its real property without leave of court.

Although under our statute (Religious Corporations Law, § 12) a religious corporation cannot sell its real property without leave of court, and although by section 21 of the General Corporation Law a foreign corporation can convey real property in the State only in the same manner as a domestic corporation, it is error to hold as a matter of law that a foreign religious corporation owning real estate here cannot enter into a valid contract of sale without leave of the court, where no evidence is given of the law of the foreign State on this point.

A religious corporation may enter into a contract for the sale of its real estate with the condition that the conveyance is to be made if permission of the court can be obtained. Even if such condition is not expressed in the contract the court will imply it.

A court of equity in a suit for the specific performance of such contract has power to inquire into its fairness, to approve the proposed conveyance and direct it to be made, if no valid reason appears for refusing such relief.

Where, however, the sale at the price contracted for would be disadvantageous to the corporation, it will be relieved from the contract upon placing the vendee in *statu quo*.

Where the corporation has refused to carry out the contract and has wrongfully refused to return to the vendee her payment thereon and where specific performance cannot be decreed and it appears that the proposed transfer would be disadvantageous to the corporation, the vendee will be adjudged to have an equitable lien on the premises for the amount paid by her and to be entitled to enforce such lien by a sale of the property, if the facts warrant. This, although the corporation had sold the property to other parties.

Respondents who subsequently purchased the premises from the corporation with full knowledge of the prior contract and rights occupy no better position than does the corporation itself.

Where on appeal in an equity suit the facts are not in dispute, the court has power to direct such judgment as the parties are equitably entitled to. *Muck v. Hitchcock*, 323.

2. *Merger and consolidation distinguished.* There is a distinction between a consolidation and merger of corporations. Upon a consolidation a new corporation comes into existence, and the prior corporations cease to exist. Upon a merger the existence of one of the corporations is continued without the formation of a new corporation, the others being merged in it. The continuing corporation becomes the successor of the merged corporations subject to the rights and obligations imposed by statute. *Matter of Bergdorf*, 529.

3. *Action to recover money paid to officer in violation of section 66 of the Stock Corporation Law — allowance to officer for rent and board — amendment of pleading.* Where a hotel company has failed to pay certain installments of rent due under its lease, a subsequent payment to its president for services as manager is a violation of section 66 of the Stock Corporation Law, prohibiting transfers of property to officers or stockholders of a company after it has failed to pay its debts, and the amount so paid may be recovered in an action by the receiver of the company.

But in such an action it is proper to allow the president a certain amount for the rent of rooms and board to which he was entitled under his agreement for services, and such amount, having been returned, may be deducted from the recovery.

Where parties by mutual consent, in effect, modify the pleadings on the trial, they are bound thereby on appeal. *Montague v. Hotel Gotham Co.*, 687.

4. *Certificate of stock not negotiable instrument — assignment of certificate — action to recover possession of stock after making loan thereon — estoppel of owner from denying acts of agent — rights of bona fide transferee.* A certificate of stock is not a negotiable instrument.

An assignment of a certificate of stock with a power of attorney indorsed upon the back of the certificate, although in blank, except as to

CORPORATION—Continued.

signature and witness, presents such indicia of title that an innocent holder obtains good title.

If the assignment and power, though upon a separate paper, identify by description the property intended to be assigned, the same rule applies.

Plaintiff, a banker, loaned his brokers a certain sum on twenty-five shares of stock of the Standard Oil Company and received the usual collateral stock note. Subsequently, the brokers being unable to repay the loan, plaintiff sought to have the stock transferred to him in order that he might realize thereon as collateral and, discovering that one B. claimed title, brought action against said company and the said B., praying that he be adjudged the owner of the stock. It appeared from the evidence that B. delivered the certificates of stock in question to one R., his brother-in-law, as security to him for the purchase of certain stock, although without any power to transfer or deal with it; that an assignment and power of attorney had been delivered to R. three years before for a different purpose; that when R. was suddenly called upon by his brokers he took the certificate of stock, pinned the transfer to it, and forwarded it to the plaintiff's brokers with the agreement that they should use it as collateral in securing a loan and they secured the loan from plaintiff.

Held, that plaintiff should be awarded the ownership of the stock and that the defendant B. should seek his remedy against R., his agent, whose acts he is precluded from disputing.

An agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a *bona fide* transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal. *Talcott v. Standard Oil Co.*, 694.

Accommodation paper—*ultra vires*.

See BILLS AND NOTES, 4.

Agreement to advance money to corporation—provision for appointment of lender's nominees to office—enforcement.

See CONTRACT, 1.

When directors of corporation not liable to creditor for transfer of assets to assignee.

See DEBTOR AND CREDITOR, 2.

Inspection of books—laches.

See DISCOVERY, 4.

Inspection of books—failure to make demand for information before petitioning.

See MANDAMUS.

Right of officers to assign claim after dissolution.

See MUNICIPAL CORPORATION, 6.

Examination before trial.

See PRACTICE, 2.

Powers—authority of agents—notice.

See PRINCIPAL AND AGENT, 7.

Service of summons upon corporation.

See PROCESS, 1.

Conveyance of land to officer in trust—passive trust—action by officer's wife for dower.

See REAL PROPERTY, 1.

Pledge of jewel by agent with consent of officer of corporation—when act of legal entity and act of officer cannot be distinguished.

See REPLEVIN.

COSTS.**Action by city on bond—extra allowance.**

See CONTRACT, 3.

Suit for accounting—extra allowance.

See EQUITY, 1.

COSTS — *Continued.*

Amendment of answer.
See PLEADING, 8.

Amendment of complaint.
See PLEADING, 9.

Security — removal of plaintiff from State.
See PRACTICE, 8.

COUNTY.

Removal of superintendent of highways by supervisor.
See CERTIORARI, 8.

Power of board of supervisors — fixing boundary between town and city.
See MUNICIPAL CORPORATION, 1.

COURT.

Jurisdiction — trial of offender on Sunday — Magistrate's Court, city of New York. A magistrate of the city of New York has no power to try and sentence on Sunday a woman who has pleaded not guilty to a charge of soliciting for purposes of prostitution.

The provisions of the city charter relating to the attendance of magistrates in court on Sunday do not authorize the trial on that day of an offender who pleads not guilty, that being forbidden by section 5 of the Judiciary Law. *People ex rel. Ryan v. Superintendent*, etc., 794.

Reversal of judgment of Justice's Court.
See APPEAL, 6.

Power of court to decide order of names on ballot.
See ELECTION LAW, 8.

Justice's Court — practice — objection to misjoinder of actions.
See PLEADING, 6.

CRIME.

1. *Change of venue — when change granted — effect of previous applications for speedy trial.* A defendant may apply for a change of the place of trial of a criminal action on the ground that a fair trial cannot be had in the county where the venue is laid.

Whether or not the application should be granted is to be determined by the exercise of judicial discretion and each case must be decided upon its own facts. It is enough if the court can find that in all human probability such a condition exists.

Where a defendant has made three applications for a speedy trial in the county where the indictment was found and has succeeded in procuring a removal of his case to the Court of General Sessions on the ground that the Supreme Court would adjourn for the summer months and has urged the vacating of a stay which had been granted, the court on his motion to change the place of trial may look upon the precedent publications upon which he now relies to show a prejudiced public from which a fair jury could not be drawn in the same light that the defendant did when strenuously insisting upon a speedy trial and may confine its examination to matters occurring thereafter. *People v. Hyde*, 181.

2. *Information charging attempt to bribe another to commit perjury — evidence.* An information for violation of section 818 of the Penal Law, which among other things, charges that defendant attempted to bribe M., the owner of a truck that had been stolen, to procure his servant, G., the driver thereof, when subpoenaed as a witness, to commit perjury and to fail to identify at the examination before the magistrate one K., who had been seen with the truck and arrested, sufficiently charges an attempt to incite G. to commit a crime, although there is no evidence that G. had any knowledge of the larceny.

Evidence examined, and held, insufficient to sustain a conviction under the above information. *People v. Bloom*, 295.

3. *Usury — Banking Law, section 814 — security not necessary — Banking Law and Penal Law not inconsistent — repeal by implication — when defendant taking usury liable as principal — defenses — burden of proof.* One who makes a loan of money less than \$200 for more than the legal

CRIME — *Continued.*

rate of interest is guilty of a violation of section 314 of the Banking Law, although no security is taken. But where the usurious loan is on personal credit, security must be given in order to constitute a misdemeanor.

Section 2400 of the Penal Law, re-enacting chapter 661 of the Laws of 1904, which made the taking of security an essential element to the crime of usury as therein defined, did not repeal by implication section 314 of the Banking Law.

Repeals by implication are not favored and are not effected unless two statutes are clearly inconsistent, or the new statute is intended to establish a complete system for the entire subject-matter of the legislation.

Section 2400 of the Penal Law and section 314 of the Banking Law are not inconsistent, but are complementary to each other, the latter relating to usury in certain counties only.

A person who makes a usurious loan contrary to section 314 of the Banking Law is liable as a principal, although he made the loan on behalf of another.

In a prosecution for said crime the People need not show that the defendant was not one of the particular corporations authorized by the Banking Law to charge interest on loans in excess of six per cent. The burden is upon the defendant to bring himself within the exception of the statute. *People v. Schultz*, 844.

4. *Burglary — grand larceny — evidence — possession of property as evidence of guilt — refusal of defendant to testify — declarations of persons made at time of their joint arrest.* One of three persons indicted for burglary and grand larceny in taking two horses and some harness from a stable, was tried and found guilty. There was no direct proof connecting the defendant or the others with the crimes charged. It depended almost entirely upon the possession of the property and the circumstances thereof. Evidence examined, and held, insufficient to connect the defendant with the crimes charged.

The conscious, exclusive and recent possession of stolen property warrants an inference that the possessor is guilty of the crime by which such property was taken from its owner.

Such possession, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction.

The neglect or refusal of a defendant to testify does not create any presumption against him.

Declarations of one of three persons made at the time of their joint arrest are not admissible upon their trial as part of the *res gestæ* in so far as they refer to past occurrences, nor are they admissible upon the theory of a conspiracy, unless such conspiracy be proven.

But such declarations, made in the presence of the accused, are admissible for the purpose of ascertaining his reply to them. *People v. Friedman*, 878.

Trial of offender on Sunday — Magistrate's Court, city of New York.
See COURT.

[For tables containing all sections of the Penal and Criminal Codes cited and construed in this volume, see *ante*, p. lxii.]

DAMAGES.

Action to recover for death caused by negligence — verdict not excessive — practice — motion to set aside assessment of damages — discretion — appeal — review of discretion — evidence not going to damages — privilege — communications made to physician — waiver. A verdict of \$15,000 for the death of a man sixty years of age who had been earning \$30 a week as an architectural draftsman and had been doing other business and who left surviving a widow and two grown daughters, one of whom lived with her parents, though large, is not excessive.

Where after judgment absolute for the plaintiff has been rendered by the Court of Appeals on the defendant's stipulation and subsequently the damages of the plaintiff have been assessed under section 104 of the Code of Civil Procedure, it is improper for the defendant to move to set aside the verdict on the judge's minutes and for a new trial under section 999 of the Code of Civil Procedure.

DAMAGES—Continued.

It seems, however, that such motion may be treated as one to set aside the inquisition and may be considered by the court in its discretion.

Such motion to set aside the inquisition will not be granted merely for the admission or exclusion of evidence unless it appear that the error defeated the ends of justice.

The discretion of the trial court in granting or denying a motion to set aside such inquisition is reviewable by the Appellate Division, but not by the Court of Appeals.

An order refusing to set aside the inquisition will be affirmed on appeal, where no improper evidence was admitted on the question of damages.

The privilege of communications made by a patient to his physician in his professional capacity created by section 834 of the Code of Civil Procedure is not for the benefit of the physician, but for that of the patient, and may be waived by him, or, after his death, by his personal representative.

The error of a trial court in refusing to compel a physician to disclose communications received from a patient is not reversible error, even if there has been an express waiver on behalf of the patient, unless the evidence sought was material to the issues.

On an inquisition to assess damages for a death caused by negligence it is not reversible error for the court to refuse to allow the decedent's physician to be questioned by the defendant as to the decedent's physical condition five or six years before the accident, where the form of the question was not specific enough to indicate that it was sought to show that he was permanently injured in health. *Trieber v. New York & Queens County Railway Co.*, 804.

Action by contractor on *quantum meruit*—interest.

See CONTRACT, 2.

Breach of contract—failure to allow nominal damages—profits—losses—measure of damages.

See CONTRACT, 5.

Building contract—when materialman not limited in recovery to contract price.

See CONTRACT, 6.

Breach of contract of employment.

See CONTRACT, 7.

Breach of contract to convey land—deposit on contract—equitable lien—sale to other persons.

See CORPORATION, 1.

Action against attorney for negligence.

See DECEDEDENT'S ESTATE, 1.

Slander of title of real property.

See LIBEL, 1.

Street closing, New York city.

See NEW YORK CITY, 1.

Widening street, New York city—effect on grade.

See NEW YORK CITY, 3.

Failure of railroad to remove inflammable material from right of way—amount of damages.

See RAILROAD, 4.

Failure to demand delivery of goods sold.

See SALE, 2.

DEBTOR AND CREDITOR.

1. *Contempt—supplementary proceedings—recitals in order directing imprisonment for contempt.* An order adjudging a judgment debtor guilty of contempt of court because of certain answers given on his examination in supplementary proceedings and directing his imprisonment if he failed to pay the fine imposed is fatally defective unless it contains an adjudication as to the specific facts deemed to be a contempt of court. A recital in said order which is only a general description of the

DEBTOR AND CREDITOR — *Continued.*

court's impression of the judgment debtor's whole examination is insufficient. *Matter of Gordon v. Feldberg*, 246.

2. *Transfer of assets by debtor and assumption of debts by assignee — election — assertion of claim against assignee — when directors of corporation making transfer not liable to creditor.* A judgment creditor having filed a proof of claim against a bankrupt corporation which had assumed the debts of his original debtor, another corporation, cannot subsequently bring an action against the directors of the original debtor on the theory that they had no right to sell its assets to the company which assumed the debt. This, because the directors were not parties to the contract, but merely trustees for their corporation, and were not the plaintiff's original debtors, and also because the plaintiff by filing the claim in the bankruptcy proceedings affirmed the validity of the transfer. *Washburn v. Rainier*, 800.

General assignment by drawer of draft — failure of drawee to accept — rights of payee to security in hands of drawee.

See BILLS AND NOTES, 2.

Action by creditor to recover money paid to officer of corporation in violation of law.

See CORPORATION, 3.

Insolvent corporation — inspection of books.

See DISCOVERY, 4.

Receiver in supplementary proceedings against remainderman — death of life beneficiary — action against trustee.

See TRUST, 1.

See BANKING.

DECEDENT'S ESTATE.

1. *Executor and administrator — action against attorney for negligence — burden of proof — appeal — evidence — damages — commissions of executors — liability of attorney for advising client to testify falsely.* Where executors and trustees, who have been removed by the surrogate for incompetency, bring an action against their attorney for negligence, alleging, *first*, defendant's lack of due care and diligence in the matters submitted to him in relation to the administration of the estate resulting in their removal and loss of commissions; *second*, alleging lack of skill and diligence in the preparation, filing and presentation of their account, resulting in their being charged personally with the costs, the burden is upon the plaintiffs to prove the breach of duty on the part of the defendant and the amount of damages.

Upon an appeal from the dismissal of the complaint at the close of the plaintiff's case in such an action, every fair intendment arising upon the evidence must be given to them. Evidence examined, and *held*, that the plaintiffs should have a new trial.

In the first cause of action the measure of damages is the difference in the pecuniary position of the client from what it would have been had the attorney acted without negligence.

Damages for loss of commissions, past and prospective, are so uncertain as to their character that they should not be allowed.

Commissions of executors and trustees are not a matter of right, but rest in the discretion of the surrogate.

It seems, that if, in the second cause of action, the plaintiffs can establish that their pecuniary loss was due to the lack of care, skill and diligence of the defendant in the preparation, filing and presentation of their account, they may recover.

It seems, that an attorney who advises a client, an executor, to testify falsely in a matter under his supervision, violates his retainer and damages resulting therefrom may be actionable. *Flynn v. Judge*, 278.

2. *Claim for services rendered testator during his lifetime — proof not establishing contract — clearest proof required — erroneous charge — presumption — payment of wages to claimant.* Action against an executor to recover for alleged services rendered to the testator during his lifetime and to members of his family at his request, the plaintiff claiming an express contract, and also an express promise to leave her

DECEDENT'S ESTATE — *Continued.*

by will an amount sufficient to compensate her. Evidence examined, and *held*, that the plaintiff wholly failed to establish her claim,

The rule that such claim against an estate must be established by the clearest and most convincing evidence, given and corroborated in essential particulars by disinterested witnesses, obtains in an action at law as well as in an action for the specific performance of a contract.

In such action against an estate it is error for the court to rule that the Statute of Limitations is not a bar to any part of the claim back of six years where there is no evidence whatever establishing plaintiff's claim of an express promise to leave property by will to compensate her.

Where it appears that such claimant against an estate received regular wages the presumption is that the payments were in full for all services rendered.

Evidence examined, and *held*, that a finding by the jury that regular payments for services were not made was against the weight of evidence. *Reilly v. Burkeman*, 548.

Action by executor of payee of note against maker.

See BILLS AND NOTES, 8.

Validity of bequest — charitable use — legacy to French theological school.

See CONFLICT OF LAWS.

Deposit of bonds in envelope addressed to donee.

See GIFT.

Death of one defendant — reviving action — failure of representative to answer supplemental complaint.

See PRACTICE, 4.

Transfer tax — valuation of life estate.

See TAX, 2.

See TRUST.

See WILL.

DEED.

Effect of restrictions in habendum clause — affirmative covenant to build fences — breach of covenant as ground for prescriptive right.

See REAL PROPERTY, 2.

DEFAULT.

When judgment by default should not be entered.

See PRACTICE, 4.

DEFINITION.

"Coloring matter" defined.

See PUBLIC HEALTH, 2.

DEPOSITION.

See DISCOVERY.

DISCOVERY.

1. *Examination of party before trial — fraudulent conspiracy of defendants — sufficiency of moving papers.* The right to examine an adverse party before trial is a substantial one which should not be denied if made in good faith and for the purpose of obtaining testimony to be used on the trial. It should only be denied if it is sought for some ulterior purpose.

Where from the nature of an action it seems probable that plaintiff will have to produce the defendants as witnesses to prove his cause of action he will generally be allowed to examine them before trial.

Where the complaint alleges that defendants fraudulently conspired to place a fictitious lease upon premises owned by one of them for the purpose of inducing the plaintiff to purchase the same for more than their real value and the answer is a general denial, plaintiff should be allowed to examine defendants before trial as to the alleged conspiracy since defendants are the only persons who have knowledge of the existence of the alleged fraudulent acts and who can testify to them.

Where plaintiff's moving papers state not only that he requires the testimony sought to prepare for trial, but also that he intends to use it on the

DISCOVERY—Continued.

trial, and the papers show that he expects to prove certain material facts in issue by the examination, they are sufficient in this respect.

The moving affidavits on a motion to examine an adverse party before trial should allege facts, not conclusions or allegations upon information not disclosed.

But in an action involving fraudulent concealment plaintiff will not be required to allege specifically as facts matters which under the theory of the complaint are solely within the knowledge of defendants. *Kornbluth v. Isaacs*, 108.

2. *Examination of defendant after issue joined—equitable suit for accounting—scope of examination.* To sustain an order for the examination of an adverse party after issue joined it must affirmatively appear that the examination is material and necessary to the applicant in the prosecution or defense of the action.

Where in a suit in equity for an accounting the allegations of the complaint upon which the right to the accounting is predicated are denied this issue must first be determined and an interlocutory judgment entered. If such judgment be for the plaintiff, then, and not until then, may the accounting be had.

Hence, where in such a case no interlocutory decree sustaining the plaintiff's right to an accounting has been entered, an order for the examination of the defendant before trial should limit the examination to those matters upon which the plaintiff's right to an accounting is predicated. *Del Genovese v. Del Genovese*, 266.

3. *Husband and wife—action for separation—counterclaim—examination of defendant as to his financial condition denied.* Where in an action for separation the plaintiff demands relief on the ground of defendant's cruelty, abandonment and failure to support her, and the defendant, after admitting the abandonment and non-support, sets up a counter-claim wherein he alleges he was justified in such abandonment because of plaintiff's cruel and inhuman treatment of him and abandonment as well, an order for the examination of the defendant before trial to disclose the amount of his income and property that the amount of alimony may be determined should not be granted. The question of defendant's financial condition in reference to any award of alimony does not become an issue until plaintiff has succeeded in establishing her right to the judgment which she seeks. *Van Valkenburgh v. Van Valkenburgh*, 482.

4. *Inspection of books of insolvent corporation—laches.* The plaintiff in an action for damages resulting from false representations whereby the defendant, an individual, induced him to purchase stock of a corporation which subsequently became bankrupt, is entitled, on learning that the books of the corporation have come into the defendant's hands, to inspect them in order to enable him to prove the facts as to which the false representations were made.

The examination should not be denied on the ground of laches although the motion therefor was not made until the case was about to be tried, if the plaintiff learned that the books were in the defendant's possession only a few days before the motion and the defendant has not been prejudiced by the delay. *Smith v. Rubel*, 670.

Examination of municipal corporation before trial—inspection of public records.

See MUNICIPAL CORPORATION, 4.

Examination of party before trial.

See PRACTICE, 2.

DIVORCE.

Failure to establish adultery of defendant.

See HUSBAND AND WIFE, 3.

DOMESTIC RELATIONS.

See HUSBAND AND WIFE.

DOWER.

Divorce—death of husband—testimony of wife that she was never served with summons.

See HUSBAND AND WIFE, 1.

DOWER — *Continued.*

Corporation — conveyance of land to officer in trust — passive trust — action by officer's wife for dower.

See REAL PROPERTY, 1.

EJECTMENT.

When judgment in ejectment conclusive in action to partition premises.

See PARTITION, 1.

ELECTION.

Action against undisclosed principal — rescission of contract.

See PRINCIPAL AND AGENT, 8.

ELECTION LAW.

1. *Selection of members of party committees — repetition of names of candidates on ballots where district divided.* Where a party organization acting under the power conferred by the Legislature has selected the Assembly district as its unit of representation and has also fixed the ratio for such representation, based on the votes cast for its candidate for Governor at the preceding State election, the members of the county committee elected by Assembly districts become *ipso facto* members of the judicial, senatorial, congressional, assembly, municipal court, aldermanic, city and borough district committees.

Thus a single appearance of the names of the candidates for the county committee upon the primary ballot is sufficient.

The sole exception to this result is where there are Assembly districts which have been subdivided so that they are entitled to representation in two or more of such committees. In such cases it is the duty of the party organization to establish rules for the proper apportionment of membership between the various Assembly districts and parts of Assembly districts entitled to participation therein, and in the Assembly districts so subdivided the ballot should contain the names of the candidates for membership upon the county committee, and such names should be repeated as often as there are other committeemen to be elected for smaller units than the entire Assembly district, apportioned among the other committees in such numbers as the party rules may determine. *Matter of Koenig v. Britt*, 68.

2. *Primary elections — use of party emblem — constitutional law — printing name of candidate more than once on ballot.* As long as full liberty is given for the selection of other emblems and no unfair discrimination is exercised, the mere fact that the party committee which nominally represents the majority of the party membership is given the right to use the party emblem on the primary ballot is not an abuse of the legislative power.

Section 57 of the Election Law and so much of section 58 as provides for the use of a party emblem upon primary ballots are not unconstitutional on that ground.

The purpose of the Legislature was to surround the primary election with every safeguard of the regular election and to give at both the same protection to the voter in the exercise of his franchise and the same freedom in the selection of his candidates.

That part of section 58 of the Election Law which prohibits the name of a candidate at a primary election from appearing on the ballot more than once in connection with the same office or position is unconstitutional. *Matter of Hopper v. Britt*, 94.

3. *Primary election — order on ballot of names of candidates for delegates to national convention — power of court to interfere.* Since there is no direction in the Election Law as to the order in which names of candidates for delegates to the National convention shall be placed upon the ballot, the court has no power to interfere with the acts of the boards of elections. *Matter of Duell*, 690.

4. *Organization of political convention — Election Law, section 112, not retroactive — vote by proxy.* Section 112 of the Election Law, relating to the organization of political conventions, has no application to the meetings and procedure of a party committee, appointed before the statute was enacted, which has assembled to designate persons to be voted for at primaries.

ELECTION LAW — *Continued.*

Where the rules of such committee, appointed before the statute was enacted, permit members to vote by proxy, they may do so, and designations made on votes so cast are valid. *Matter of Daniel*, 777.

EMINENT DOMAIN.

Laws of 1894, chapter 147, and Laws of 1897, chapter 664, authorizing construction of bridge across the Harlem river construed — certiorari to review action of board of assessors. Certiorari to review the proceedings of the board of assessors of the city of New York in awarding damages caused by a change of grade of Willis avenue in erecting a bridge across the Harlem river pursuant to Laws of 1894, chapter 147, and Laws of 1897, chapter 664. Statutes construed, and held, that the proceedings before the board of assessors should be dismissed. *People ex rel. City of New York v. Sandrock R. Co.*, 651.

Street closing, city of New York — damage to abutting owners.

See NEW YORK CITY, 1.

Street opening, New York city — offsetting assessment against award to same party.

See NEW YORK CITY, 2.

Widening street, New York city — effect of change of grade — damages.

See NEW YORK CITY, 3.

Condemnation of land necessary to operate railroad.

See RAILROAD, 3.

EMPLOYERS' LIABILITY ACT.

Death of workman in manhole — foreman and superintendent distinguished.

See MASTER AND SERVANT, 1.

EQUITY.

1. *Suit for an accounting and to recover on a contract — effect of fraudulent concealment upon limitation of action at law — interest — extra allowance.* Plaintiff, as executor of and trustee under a will with his coexecutors and trustees, held certain shares of stock, and having no available funds to protect the value of said stock which was in danger of being destroyed, entered into a contract with the defendant, who agreed after an assignment of the stock to him to institute proceedings to protect its value and, if possible, to realize and recover the value thereof and to pay to the plaintiff a stipulated sum, less the amount of the disbursements. Within three years after the date of the contract the defendant, without instituting legal proceedings of any kind, sold the stock for much more than the sum stipulated in the contract. He deliberately and fraudulently made the trustees believe that the stock had not been sold by him but had become valueless. They did not learn of the sale until more than eight years thereafter.

In a suit in equity for an accounting and to recover under the contract, held, that the cause was properly brought in equity; that the six-year Statute of Limitations was no defense; that plaintiff should recover the sum stated in the contract with interest thereon, compounded yearly, and that an extra allowance may properly be granted to the plaintiff, although the defendant offered no evidence, but application for extra allowance cannot be passed upon until all the issues have been settled.

The concealment and deception on the part of the defendant constituted fraud and, when discovered, gave to the trustees a cause of action which could be enforced in equity for fraudulent concealment.

One cannot, by his own fraudulent act, destroy a cause of action which can be enforced at law, and thereby escape in equity liability to the extent to which the party has been defrauded.

Where one has obtained an advantage by fraud, equity will not permit him to hold it by resorting to the Statute of Limitations. *Clarke v. Gilmore*, 445.

2. *Statute of Frauds — action for breach of oral contract to convey lands in consideration of discontinuance of action — part performance of oral contract.* The plaintiff made a contract to purchase three and one-half acres of a tract of land upon which there was a prior mortgage. She brought suit to enforce specific performance of her contract and filed a

EQUITY—Continued.

lis pendens. The mortgagee sued to foreclose the mortgage, making the plaintiff a party defendant. To hasten the foreclosure the defendant requested the plaintiff to discontinue her action and cancel the *lis pendens*, which she did in consideration of the defendant's oral promise, upon his purchase of the property at the foreclosure sale, to convey to the plaintiff the land which she had contracted to purchase, and to save her harmless from loss by reason of the discontinuance of her suit for specific performance. The defendant purchased the land at the foreclosure sale and sold the three and one-half acres to other parties, and plaintiff brings this action to recover damages for breach of contract, alleging injury to other property to which she intended to annex the three and one-half acres. The defendant pleads the Statute of Frauds.

Held, that the plaintiff's relation to the mortgage was that of a subsequent vendee and, therefore, she did not lose anything by the discontinuance of her suit and the canceling of the *lis pendens*;

That the promise to convey the three and one-half acres, when purchased, was void for not being in writing; that there is no element in the case to take the agreement out of the Statute of Frauds; the act of part performance was the discontinuance of an action which it was futile to prosecute;

That there was no confidential relation between the parties, for an abuse of which relief may be obtained in equity.

The acts of part performance which will take a case out of the Statute of Frauds must be unequivocally referable to the agreement of which they are a part execution. *Todd v. Pratt*, 459.

Cancellation of lease for failure to pay rent on day fixed.

See LANDLORD AND TENANT, 2.

Foreclosure of mortgage—bankruptcy of mortagor—appointment of receiver—respective rights of receiver and of trustee in bankruptcy.

See MORTGAGE, 1.

Conveyance of part of mortgaged lands—release of remaining lands from lien of mortgage—when rule as to marshaling assets inequitable.

See MORTGAGE, 4.

Abatement of nuisance—issues raised by defendants between themselves—judgment for plaintiff should not be postponed.

See NUISANCE.

Taxation of railroad for improvement of streets passing under it.

See RAILROAD, 6.

Remedy at law—failure to raise question.

See WILL, 1.

ESTOPPEL.

When contractor estopped to deny terms of agreement.

See CONTRACT, 8.

Denial of acts of agent.

See CORPORATION, 4.

Action against undisclosed principal for breach of contract—election of remedy.

See PRINCIPAL AND AGENT, 8.

EVICTION.

Constructive eviction—implied covenant by landlord to furnish heat.

See LANDLORD AND TENANT, 1.

EVIDENCE.

Impressions of witness.

See APPEAL, 6.

Parol evidence to vary terms of note.

See BILLS AND NOTES, 8.

Municipal ordinance—judicial notice.

See CONTRACT, 8.

Breach of contract—what evidence admissible on question of damages.

See CONTRACT, 5.

EVIDENCE — *Continued.*

Judicial notice of treaty.
See CONTRACT, 15.

Burglary — grand larceny — refusal of defendant to testify — declarations by persons made at time of their joint arrest.
See CRIME, 4.

Negligence action — communications made to physician — waiver of privilege.
See DAMAGES.

Section 829 of the Code of Civil Procedure — presumption.
See HUSBAND AND WIFE, 1.

Notice to insurance company of loss under policy.
See INSURANCE, 5.

Negligence — *res ipsa loquitur.*
See MASTER AND SERVANT, 5.

Real property — presumption of lost grant — twenty years' possession essential.
See PARTITION, 1.

Presumption of payment.
See PARTITION, 2.

Collision at grade crossing — weather conditions — testimony of district forecaster.
See RAILROAD, 5.

Conveyance of land to officer in trust for corporation — minute books of corporation — resolution authorizing conveyance.
See REAL PROPERTY, 1.

Testamentary capacity — opinion of expert.
See WILL, 4.

EXECUTION.

Sheriff — duty to hold funds — liability for act of deputy.
See ATTORNEY AND CLIENT.

EXPLOSIVES.

Death by explosion of dynamite.
See MASTER AND SERVANT, 8.

FORECLOSURE.

See MORTGAGE.

FOREST, FISH AND GAME LAW.

Failure of railroad to remove inflammable material from right-of-way.
See RAILROAD, 4.

FRAUD.

When treasurer of corporation not authorized to sign negotiable paper — implied authority.
See BILLS AND NOTES, 4.

Action to recover possession of notes — contributory negligence as defense.
See BILLS AND NOTES, 6.

Examination of party before trial.
See DISCOVERY, 1.

Statute of Frauds — breach of oral contract to convey land — part performance.
See EQUITY, 2.

GAS AND ELECTRICITY.

Injury to electrician repairing elevator.
See NEGLIGENCE, 5.

GIFT.

Deposit of bonds in envelope addressed to donee. The fact that a testator before his death placed certain unregistered bonds in an envelope, across the face of which he wrote, "The property of Miss Lizzie Beck, 842 Forest Avenue, N. Y.", and placed the envelope in his safe deposit box

GIFT—*Continued.*

to which he alone had access, does not establish a gift of the bonds to the person whose name appears on the envelope.

The courts will not consummate the attempted transfer by constructing a trust, for to do so would defeat the Statute of Wills. *Beck v. Staudt*, 35.

GUARANTY AND SURETYSHIP.

Dissolution of partnership—*undertaking by remaining partner to pay firm debts*—*action against surety*—*proof of judgments against firm*. A judgment against a principal is not even evidence against his surety unless the latter had notice of the suit and an opportunity to defend, except in the case of a covenant to indemnify against the consequences of a suit.

Thus, in an action against the surety on an undertaking given on the dissolution of a partnership providing that the remaining partner "shall well and truly pay * * * all commercial debts and bills payable by said copartnership," it is reversible error to permit plaintiff to prove over objection and exception that judgments had been recovered against the partnership subsequent to the giving of the undertaking.

Where there was no attempt to prove either the existence of claims covered by the undertaking or that the defendant had notice of the suits in which the judgments were recovered a judgment in plaintiff's favor will be reversed. *Mulry v. Eckerson*, 29.

Bond accompanying bid on municipal contract—mistake in bid—liability of surety.

See CONTRACT, 8.

Action against contractor on municipal improvement—sureties not defendants are not bound by judgment.

See LIEN, 5.

Misjoinder of actions—joining action on parents' guarantee with suit against infant.

See PLEADING, 6.

HABEAS CORPUS.

Sufficiency of complaint before magistrate.

People ex rel. Hertz v. Warden of City Prison, 939.

HIGHWAY.

Removal of county superintendent by board of supervisors—Highway Law construed.

See CERTIORARI, 3.

Collision with automobile.

See MOTOR VEHICLE, 1, 2.

Death caused by hole in pavement of street.

See MUNICIPAL CORPORATION, 8.

Paving contract construed—notice to contractor to make repairs.

See MUNICIPAL CORPORATION, 6.

Injury to boy by fall of building material piled in street.

See NEGLIGENCE, 3.

Injury by defective approach to abutting property—liability of town.

See NEGLIGENCE, 4.

Injury to pedestrian by fall on icy sidewalk—liability of abutting owner

See NEGLIGENCE, 9.

Action for personal injuries—notice to town.

See NEGLIGENCE, 10.

Caving in of street—liability of city.

See NEGLIGENCE, 11.

Collision at grade crossing.

See RAILROAD, 5.

Taxation of railroad for improvement of streets passing under it.

See RAILROAD, 6.

HUSBAND AND WIFE.

1. *Dower — death of husband — divorce — testimony of wife that she was never served with summons — evidence — section 829 of the Code of Civil Procedure — presumption.* A judgment of the Supreme Court is itself presumptive evidence of the court's jurisdiction.

Where in an action for dower it appears that plaintiff left her deceased husband over sixty years before the beginning of the action, and that at that time he obtained a judgment of absolute divorce against her in this State, and it further appears that from that time plaintiff was excluded from any participation in the care and custody of her children, that she supported herself without any demands on her husband, and that although desiring to see her children she did not attempt to force her husband to permit her to do so, the testimony of the plaintiff that she was never served with the summons in the divorce action should not be allowed to outweigh the affidavit of service, to the detriment of persons who had acquired her former husband's property relying upon the validity of the decree of divorce.

Evidence examined, and held, that the verdict for the plaintiff should be reversed as against the weight of evidence.

Testimony which the public policy of the State excludes as irrelevant and immaterial and to which objection is seasonably interposed is presumptively prejudicial to the party objecting; it is only where it is obvious that the testimony could not have affected the result that the courts will overlook the error.

It is reversible error to allow plaintiff to testify that the reason she left her husband's home was because his father habitually assaulted her with a bellows and did other acts of cruelty and because her husband himself had cut her with a knife and otherwise ill used her. Such testimony is improper under section 829 of the Code of Civil Procedure. *Smith v. Cockcroft*, 255.

2. *Action to annul marriage — former husband living — comity — decree of foreign State dissolving marriage — judgment — force and effect of erroneous New York decree — conflict of judgments.* In an action to annul a marriage on the ground that at the time of the contract the defendant had another husband, it appeared that in 1871 the defendant was married in Louisiana to K.; that thereafter they moved to Texas, and in 1878 defendant for sufficient cause left her husband and established her domicile in Louisiana; that in 1882 K., who had continued to reside in Texas, procured in that State a dissolution of the marriage on the ground of abandonment after personal service upon the defendant in Louisiana and her failure to appear. In 1895 defendant married H. in New York and subsequently brought an action against him for separation on the ground of abandonment, in which H. appeared and asked as a counter-claim that the marriage be annulled on the ground that plaintiff had never been legally divorced from K. The counterclaim was sustained and the marriage was annulled (following *Atherton v. Atherton*, 155 N. Y. 129), neither party appealing. Subsequently plaintiff and defendant were married in this State. K. and H. were both living when the marriage was entered into, and in 1907 this action was commenced, the complaint alleging both the former marriages of the defendant and that her marriage with K. was in full force and effect at the time she married the plaintiff.

Held, that the complaint was properly dismissed on the merits, as the defendant was free to contract her marriage with the plaintiff;

That the decree of the State of Texas dissolving defendant's marriage to K. must be given full credit here under the decision of the United States Supreme Court in *Atherton v. Atherton*, since Texas was the matrimonial domicile and defendant received not only reasonable but actual notice of the action, as required by the Texas statutes;

That the judgment entered in New York State dissolving defendant's marriage to H. on the ground that under the New York Court of Appeals decision in the *Atherton* case the Texas decree dissolving her marriage with K. was invalid is binding, no appeal having been taken, and conclusively annulled defendant's marriage with H., although it is erroneous under the subsequent United States Supreme Court decision in the *Atherton* case;

That the New York judgment, though erroneous, could only be set aside in a proceeding for that purpose;

HUSBAND AND WIFE — *Continued.*

That *Atherton v. Atherton* (181 U. S. 155) is not overruled by *Haddock v. Haddock* (201 id. 562), but they are distinguishable, the latter holding that a foreign decree dissolving a marriage obtained without personal service or appearance by the defendant is only valid if obtained in the State of the matrimonial domicile. *Post v. Post*, 452.

3. Divorce — failure to establish adultery of defendant. Action for absolute divorce. Evidence examined, and *held*, insufficient to establish the adultery of the defendant and that an interlocutory judgment for the plaintiff should be reversed. *Werner v. Werner*, 511.

4. Contract for support and maintenance — reduction of amount of alimony. A husband and wife after separation may enter into a valid and binding contract for the separate support and maintenance of the wife.

On an application to reduce the amount of alimony made on the ground of a change in the financial condition of the parties since the entry of the decree the court may take into consideration a contract for separate support and maintenance previously entered into by the husband and wife.

A husband, who is under obligation to support a former wife pursuant to a contract therefor and a decree of divorce awarding alimony, cannot evade liability by incurring new obligations. Thus, where he remarries in another State, and makes his second wife a large monthly allowance, the amount of alimony awarded in the divorce action should not be reduced. *Levy v. Levy*, 561.

5. Action against husband to recover for goods sold wife question for jury — evidence. Where, in an action by a tradesman to recover for goods sold to defendant's wife, it appeared that at the time of the purchase the defendant and his wife were living together; that defendant was a man of means in the habit of making his wife a liberal allowance for her personal uses; that the goods for which suit was brought were of the same general character as the wife had been in the habit of buying, and that the bill was made out to the wife, it is for the jury to say whether the articles were necessaries and whether they were sold on the husband's credit or on that of his wife. A dismissal of the complaint was error.

Evidence that long after the purchases in question the husband inserted a notice in a newspaper that he would no longer be responsible for his wife's bills was inadmissible. *Rosenfeld v. Peck*, 668.

6. Action for separation — failure to pay costs in former action — stay of proceedings on counterclaim. Where a husband was defeated in an action for absolute divorce and has failed to pay a judgment for costs, the wife in a subsequent action for separation is entitled to an order staying her husband's counterclaim for an absolute divorce upon the ground of the adultery charged in the former action until he pays the costs in said action.

The husband's counterclaim only should be stayed, for he is entitled to defend the wife's action. *Hasse v. Hasse*, 775.

Separation — examination of husband before trial as to financial condition.

See DISCOVERY, 8.

INFANT.

Life insurance taken out by infant — request to third party to pay premium — action against infant on promise to repay.

See INSURANCE, 1.

Misjoinder of actions — action against infant and on parent's guarantee.

See PLEADING, 6.

INJUNCTION.

Trade mark — copy of trade mark calculated to deceive public — practice — injunction pendente lite. Suit to enjoin the defendant from using a label alleged to be in fraudulent imitation of a label long used by the plaintiff. Evidence examined, and *held*, that the defendant's label, though not an actual copy of the plaintiff's label, so closely resembled it that equity would enjoin its use.

To warrant such injunction it is not necessary that the defendant's label be an actual copy of that of the plaintiff. It is sufficient if the resemblance be such as to deceive the ordinary purchaser.

INJUNCTION—*Continued.*

Where the imitation is apparent, use by the defendant will be enjoined *pendente lite*.

But where the use of a bottle by the defendant is not obviously unlawful, if used apart from the label, the use will not be enjoined *pendente lite*, but the issue left to be determined upon trial. *Luyties Brothers v. Zimmermann & Co.*, 542.

Removal of encroachment.

Batchelor v. Hinkle, 910.

Restraining payment of money—duty of sheriff to hold funds.

See ATTORNEY AND CLIENT.

Restraining trafficking in liquors on premises within one year after revocation of certificate.

See INTOXICATING LIQUORS.

Suit to enjoin railroad from maintaining fence across right-of-way—adverse user of property devoted to public use.

See REAL PROPERTY, 2.

Construction of municipal water works—taxation of competing company.

See TAX, 1.

INSURANCE.

1. *Life insurance taken out by infant—request to third party to pay premium—action against infant on promise to repay—failure to show that premium was advanced.* As section 55 of the Insurance Law makes an infant over fifteen years of age competent to contract for life insurance on his own life for his benefit or for that of certain specified relatives, a person who has paid the premium for the infant at his request can recover the amount from the infant the same as he might recover for necessities furnished.

But where the infant made a written request to a third person to pay the premium and has in writing agreed to repay the amount advanced, the third party or his assignee cannot recover on the written instrument itself without alleging and proving that he paid the premium. The request itself is not a contract binding on the infant, but merely evidence which might support an action to recover insurance premiums paid at the request of the infant. *Equitable Trust Co. v. Moss*, 615.

2. *Insurable interest of owner of vessel—right of owner to recover upon policy—right of owners of cargo to portion of insurance moneys.* The owner or charterer of a steamship has an insurable interest in goods in his possession to the full extent of their value against a loss for which he may become responsible.

The question whether the owner has the right to recover upon such policy is not to be determined after the loss by inquiring whether he is in fact then liable to the owners on account of such loss.

The owner of a steamboat carrying freight took out a policy of insurance indemnifying him against all loss or damage to the vessel or cargo from fire and all other risks and damages incident to the use thereof in certain waters. The insured was described in the policy as "John H. Starin, as freighter, forwarder, bailee, common-carrier or for account of whom it may concern." Subsequently the vessel was almost wholly destroyed by fire, the cargo entirely destroyed, and the owner released under the Federal statutes from personal liability on the ground that the fire was not caused by his negligence. Subsequently the owner collected all the insurance money, which exceeded his loss as common carrier. In an action by an assignee of the owners of the cargo to recover a portion of the insurance money collected by the owner of the vessel;

Held, that the owner of the vessel was only entitled to indemnity and that whatever remained after satisfying his loss was held for those who might be concerned in the loss, to wit, the owners of the cargo. *Symmers v. Carroll*, 641.

3. *Action to charge individual writers on Lloyd's policy of fire insurance—power of attorney construed.* Plaintiff, having obtained a judgment against attorneys for certain underwriters upon a Lloyd's policy of

INSURANCE—Continued.

fire insurance and having failed to satisfy the judgment, sued one of the individual underwriters for whom the attorneys purported to act under a power of attorney in the form of an agreement made between the underwriters as parties of the first part and three attorneys as parties of the second part, "and by and between each of the parties of the first part, and by and between each of the parties of the second part." The defendant contended that the power was a joint power which could not be executed by less than all, and consequently he was not liable upon a policy executed by only two of his attorneys.

Held, that the power of attorney must be construed as a joint and several power so as to give effect to the apparent intention of the parties, and that the policy was binding although not executed by all the attorneys.

A power of attorney given to two or more individuals will generally be presumed to be joint, unless the principal has indicated a different intention. *Unterberg v. Elder*, 647.

4. *Principal and agent—extension of time to pay premiums.* Where a policy of life insurance in express terms provided that only the president, vice-president, secretary or treasurer of the insured had any power to modify the terms of the contract or to extend the time for paying premiums and that the company should not be bound by any promise theretofore or thereafter made unless made in writing by one of said officers, a clerk in the medical department of the insurer, whose sole duty was to arrange appointments for the medical examination of applicants, had no power whatever to modify the policy by extending the time set for payment of premiums. *Nicoud v. New York Life Insurance Co.*, 784.

5. *Action on standard fire insurance policy—notice to company condition precedent—evidence—provision of policy as to notice to company construed—omission of venue from proof of loss.* In an action to recover for loss under a standard fire insurance policy a compliance with a provision of the policy requiring the insured to give immediate notice to the company of any loss and "within sixty days after the fire" to render a statement to the company as to the time and origin of the fire, etc., is a condition precedent to the maintenance of the action.

Evidence in such an action examined, and *held*, not to justify the jury in finding a sufficient compliance with the terms of the policy as to service of statement of time and origin of fire.

The phrase "within sixty days after the fire" as used in such a notice means within sixty days after the fire has terminated or abated to such an extent that an inspection of the damaged property may be had.

The omission of the venue from a proof of loss, sworn to before a commissioner of deeds, may be supplied by amendment. *Slocum v. Saratoga & Washington Fire Ins. Co.*, 867.

Separate actions to recover benefit from fraternal organization—interpleader.

See PRACTICE, 7.

Cancellation of contract with general agent—action for breach.

See PRINCIPAL AND AGENT, 1.

INTERPLEADER.

Separate actions to recover benefit from fraternal organization.

See PRACTICE, 7.

INTERSTATE COMMERCE.

Carmack amendment to law—liability of initial carrier for loss of goods.

See CARRIER.

INTOXICATING LIQUORS.

Injunction to restrain traffic in liquors on premises within one year after revocation of certificate—violation of subdivision 8 of section 15 of the Liquor Tax Law. Where, pending proceedings which resulted in the revocation of a liquor tax certificate on the ground that the premises had been allowed to become disorderly, a liquor tax certificate was issued to another party for the same premises, who designated the place in his application as at another street and number, an injunction under section 28 of the Liquor Tax Law, restraining the holder of the latter certificate

INTOXICATING LIQUORS — *Continued.*

from trafficking in liquors, may be granted on the application of the State Commissioner of Excise.

The holder of the latter certificate violated subdivision 8 of section 15 of the Liquor Tax Law, which, as amended by Laws of 1910, chapters 485 and 503, and by Laws of 1911, chapter 643, provides that "no person shall traffic in liquors at said premises for the period of one year from the date of the entry of a final order canceling such certificate."

It is unlawful to traffic in liquors, with or without a certificate, for the period of one year from the date when a certificate for such premises has been revoked. *Matter of Farley*, 637.

JUDGMENT.

Action on contract — res adjudicata — rights accruing subsequent to prior judgment. Action to recover money alleged to have become due under a written contract whereby the defendant, upon the performance of certain acts by the plaintiff, agreed to pay a sum of money, and further stated sums at subsequent dates to obtain and continue the employment of plaintiff for a term of years at a certain salary, and containing a provision that on the termination of the employment "for his [the plaintiff's] fault" certain obligations for payments not due should become null and void. On a former action on the same contract, the issue being whether plaintiff was discharged "for his fault," judgment having been rendered for the plaintiff, a certain item of damage was stricken out upon appeal upon the ground that the right thereto had not accrued when the action was commenced.

On a second action to recover said sum, *held*, that the former judgment conclusively established that the plaintiff had been discharged without his fault, but that the contract, not being one exclusively for services, his entire rights were not determined by the prior judgment so that he might recover the sum subsequently becoming due. *McCargo v. Jergens*, No. 2, 537.

Motion for judgment on pleadings — what may be considered.

See MASTER AND SERVANT, 7.

Ejectment — when judgment res adjudicata in partition action.

See PARTITION, 1.

Judgment on pleadings — action against real estate broker.

See PRACTICE, 2.

Frivolous demurrer — judgment on pleadings.

See PRACTICE, 5.

JURY.

Information communicated to juror out of court.

See TRIAL, 1.

LABOR LAW.

Negligence — assumption of risk.

See MASTER AND SERVANT, 6.

Injury by revolving derrick — assumption of risk.

See MASTER AND SERVANT, 9.

Fall into unguarded vat — waiver of statute.

See MASTER AND SERVANT, 10.

Section 18 construed — defective signal.

See NEGLIGENCE, 8.

LACHES.

Inspection of books of insolvent corporation.

See DISCOVERY, 4.

LANDLORD AND TENANT.

1. Rent of apartment — heating plant under control of landlord — implied covenant to furnish heat — constructive eviction — action for rent — question for jury. Where the owners of an apartment house containing thirty separate apartments all heated by a common heating plant in the basement, which was under the exclusive control of the landlords, lease one of the apartments to be used exclusively as a dwelling, and it appears that there was no way of heating the same except by the steam

LANDLORD AND TENANT — *Continued.*

radiators which formed part of the system under the landlords' control, a covenant by the latter to supply the heat necessary to keep the apartment warm and habitable will be read into the lease.

Even though there is no covenant to that effect, the landlords are obligated to supply sufficient heat to keep the apartment warm.

The landlords, having made it impossible for heat to be furnished except by the means under their control, were bound to furnish it and for their failure to do so the tenant may vacate and thereafter successfully resist the collection of the rent reserved.

The tenant would not be justified in vacating the premises because upon some particular occasion they were not kept warm, but if the landlords' failure to supply sufficient heat is continued for an unreasonable time, he may do so.

A constructive eviction is an obstruction of the beneficial enjoyment of the premises and a diminution of the consideration of the contract by the act of the landlord.

The acts of the landlord need not be with intent to compel the tenant to leave or to deprive him of the beneficial enjoyment of the property; all that is necessary is that the acts are calculated to and do make it necessary for the tenant to move.

Where it appears that during the greater part of December and for a week in January the temperature in the rented apartment was below sixty degrees Fahrenheit most of the day and that little or no heat was supplied from eleven P. M. till seven A. M., the tenant is justified in vacating the apartment.

Such insufficiently heated premises were not what had been leased and the consideration for the rent failed.

In an action to recover rent for such apartment it is reversible error for the court to hold as a matter of law that plaintiffs were entitled to recover and to direct a verdict in their favor, for, if defendant's witnesses were to be believed, he was justified in vacating the apartment. *Berlinger v. Macdonald*, 5.

2. *Lease — failure to pay rent on day fixed — custom of parties — forfeiture — when equity will not decree cancellation of lease.* Forfeitures are not favored in equity.

The purpose of a clause in a lease providing that in case of default by the tenant in any of the covenants, the landlord may at his option terminate the lease on thirty days' notice or may re-enter and resume possession, and may relet the same for the balance of the term for account of the tenant, the tenant to make good any deficiency, is to secure the payment of the rent reserved.

Such clause ordinarily should not be permitted to be used by the landlord to regain possession of a valuable piece of property whose rental value has substantially increased since the making of the lease.

Where a lease for a period of ten years at an annual rent of \$19,500 provided that the rent should be paid quarterly in advance and a custom grew up between the landlord and tenant during the first two years of the term whereby the payment on the first day of the quarter was not insisted upon, the landlord cannot cancel the lease and dispossess the tenant at the beginning of the third year because there was a twenty-one days' delay in the payment of the quarterly rent, if it appears that six days before the service of the notice canceling the lease the president of the landlord corporation talked with the tenant's vice-president about the rent then due but made no suggestion that the lease would be canceled unless the same was paid at once and if the tenant as soon as the notice of cancellation was served sent the landlord a check for the full amount due, with interest from the first day of the quarter. *Palmer & Singer Manfg. Co. v. Barney Estate Co.*, 136.

3. *Real property — lease of farm on shares — right of tenant to sell interest in unripe fruit — termination of lease — rights of vendee.* A tenant renting a farm on shares under an agreement whereby he was to pick and pack the grapes grown thereon, to furnish one-half the packages for marketing them and to deliver them at a shipping point, and in return was to receive one-half the proceeds from their sale, can sell his share of the grapes when the same come into existence, although they may not be sufficiently ripe to pick.

LANDLORD AND TENANT — *Continued.*

Under the agreement the tenant and the owner of the farm were tenants in common of the grapes which, as soon as they came into existence, were personal property.

The termination of the contract of letting by the owner and tenant before the grapes were picked did not extinguish the interest in the grapes which the tenant's vendee had acquired by the bill of sale which he had duly filed.

Where the owner, with knowledge of the bill of sale given by the tenant, terminates the contract of letting and appropriates the whole crop of grapes to his own use, he is liable in conversion to the tenant's vendee for one-half the value thereof less one-half the expense of harvesting and marketing them. *Crosby v. Woleben*, 387.

4. *Summary proceedings — jurisdiction of court.* It is essential to the jurisdiction of the court to entertain and make a final order in summary proceedings that the tenant should be in possession.

Where the uncontested evidence shows that the tenant was not in possession at the time the proceeding was instituted, and was not holding over or claiming any rights as a tenant of the premises, the proceeding should be dismissed. *Warrin v. Haveryt*, 564.

Fall through fire escape — death — duty of landlord.

See NEGLIGENCE, 1.

Death caused by failure to light stairway in tenement.

See NEGLIGENCE, 2.

LARCENY.

Grand larceny — possession of property as evidence of guilt — refusal of defendant to testify.

See CRIME, 4.

LEASE.

Implied covenant to furnish heat.

See LANDLORD AND TENANT, 1.

Failure to pay rent on day fixed — custom of parties — forfeiture.

See LANDLORD AND TENANT, 2.

Lease of farm on shares — sale by tenant of interest in unripe fruit.

See LANDLORD AND TENANT, 3.

LIBEL.

1. *Slander — real estate — slander of title — complaint — damage — insufficient allegations.* A defendant by moving for judgment on the pleadings admits the truth of the facts alleged in the complaint.

A complaint in an action for slander of title to real estate in order to constitute a cause of action must allege not only that the statement complained of was false and published maliciously, but must set forth facts showing that pecuniary damage resulted to the plaintiff by reason thereof.

Where the complaint alleges that by reason of defendant's false statements in regard to his title to certain lands plaintiff was unable to consummate the sale thereof to a realty company which was able and willing to purchase, but in connection therewith it is alleged that prior to the alleged false statements the realty company had entered into a written contract to buy and the plaintiff to sell the real estate referred to, and that such contract was in force when the alleged false statements were made, no pecuniary damage to plaintiff by reason thereof is shown, since plaintiff could have compelled the realty company to specifically perform the contract notwithstanding defendant's false statements.

Also, an allegation in the complaint that plaintiff was prevented by defendant's statements from selling the property not only to the realty company, but to certain individuals who were able and willing to buy it is insufficient to show pecuniary damage where the complaint shows that the offers to purchase by the individuals were made after plaintiff had entered into the contract with the realty company and while it was in force, for even had plaintiff desired to sell to them, he could not have done so because of his contract with the realty company. *Felt v. Germania Life Insurance Co.*, 14.

LIBEL—Continued.

2. *Evidence — testimony not relevant to issues — innuendo.* In an action for libel based upon a publication by the defendant stating that previous publications by the plaintiff criticizing a food product manufactured by the defendant were "mendacious falsehoods" and designed to compel the defendant to advertise in the plaintiff's publication, it is error to allow the plaintiff to put in evidence advertisements of the defendant and to give expert testimony showing that claims made by the defendant on behalf of its product were false, where such evidence is wholly unrelated to the alleged libelous publication of the defendant.

The evidence cannot be justified upon the ground that the issue was tendered by an innuendo in the defendant's answer, for the meaning of an article cannot be enlarged by innuendo.

Parties to an action for libel cannot give evidence attacking each other generally regardless of the issues involved. *Collier v. Postum Cereal Co., Limited*, 143.

3. *Words charging incompetency in business, when libelous per se — privileged communication — pleading.* It is libelous *per se* to publish a letter calling the local manager of a mail chute company a "venomous incompetent creature * * *" who either does not know how to put it (the chute) in order or wilfully queers it so that it will not serve the purpose for which it is wanted," and stating further that he should not be given another chance to "bedevil us and the job."

Willful words which hold a person up to hatred, ridicule, contempt or obloquy are libelous *per se*.

Words written of one in relation to his business or occupation which have a tendency to hurt or prejudice him therein are actionable although they charge no fraud or dishonesty and were written without actual malice.

One engaged in a mercantile business has as much right to recover for such libel as if he belonged to a learned profession.

Plaintiff suing for libel need not allege that the article was not privileged, the defense of privilege resting upon the defendant. *Hinrichs v. Butts*, 236.

4. *Charge of conversion.* It is libelous *per se* to charge that the plaintiff with others received money for the account of another and wrongfully disposed of and converted the same to their own use. *Johnson v. Isaacs*, 640.

LIEN.

1. *Enforcement of chattel mortgage — priority of lien of livery stable keeper in possession.* In an action brought against the mortgagor and a livery stable keeper in possession to enforce a chattel mortgage lien on a truck it appeared that the mortgagor delivered several horses and trucks to the livery stable keeper under an agreement whereby he was to pay a certain sum per month for board and storage. Subsequently the mortgagor left the truck in question with the livery stable keeper without any express agreement for its storage. Prior to the commencement of this action the mortgagor took away all but two horses and the truck in question.

Held, that the livery stable keeper was not entitled to retain possession of the truck, on which the plaintiff held a chattel mortgage, for the payment of the board of the horses and storage of other trucks, except for the reasonable charge of storage for the same, as such truck was not included in his agreement for storage;

That he would undoubtedly have a lien upon the entire number of horses and trucks which were delivered to him under the agreement to such an extent that he might hold all or any of them until the payment of all charges.

It seems, that if the truck in question had been a part of the group of chattels originally delivered to the livery stable keeper, and he had, acting in good faith, retained possession of the truck for his debt, he might be entitled to hold it. *Barrett Manufacturing Co. v. Van Ronk*, 194.

2. *Mechanic's lien — process — notice of justification of sureties — service on non-resident — service by mail unauthorized.* The provisions of the Lien Law governing service upon the lienor of notice of justification

INDEX.

LIEN—Continued.

It seems, that where the lien is upon lands where a statute is silent as to the character of service, it may be made by mail if authorized notice of a provision for such service, in the absence of a resident lienor as required by the statutes. Blumberg, No. 1, 303.

Pleading — mechanic's lien — claim of defendant to answer — statute of limitations noticed by plaintiff should not be stricken out as against suit, as is shown by the provision that single suit, they shall be consolidated.

the plaintiffs stand in the same position as no amount due them, and the findings are inconsistent the appellants' contention must fail. *Johnsen v. Service Co.*, 68

of the action there was nothing
the plaintiffs stand in the shape
as no amount due them, and
s are inconsistent the appellants
on the basis of those findings
n. Service Co. v. Hildebrand, 68
lien — municipal improvement
— sureties not made defendant
contractor, having filed a lien for
a municipal improvement, obtain
the judgment is not binding.

LIEN — *Continued.*

6. *Mechanic's lien — assignment of lien* a mechanic's lien by a contractor in payment is valid and has priority over liens subsequent.

A mechanic's lienor acquires no greater right than any general creditor of his debtor. *Pars*

7. *Mechanic's lien — foreclosure — allegation* been brought upon debt — amendment of in a suit to foreclose a mechanic's lien, it is alleged, for the information of the court, brought upon the debt, it is within the provisions of section 723 of the Code of amendment of the complaint upon the trial it being "material to the case." *Douglas*

Equitable lien on real property — continuing to convey land — deposit.

See CORPORATION, 1.

LIMITATION OF ACTION.

Effect of fraudulent concealment of facts

See EQUITY, 1.

Amendment of complaint on contract to

See PLEADING, 10.

LIQUOR TAX LAW.

See INTOXICATING LIQUORS.

MALICIOUS PROSECUTION.

Arrest for theft from freight car — probable cause by detective after charge of theft. A road company to prosecute persons stealing from a freight car as a matter of law to cause the arrest of the thief where, without improper motivation or sworn statements made by other persons, they were guilty of theft, charged in sworn statement that the person prosecuted was also guilty of specific larceny.

In an action against the railroad for malice in such arrest, it is error for the court to refuse to testify as to the investigation he made without when acting on the information received from their guilt. *Davenport v. New York Central Railroad*, 100 U.S. 524.

MANDAMUS.

Return conclusive — corporation — inspection to make demand for information before a peremptory writ of mandamus is issued by the respondent, the relator, standing upon the facts of a demurrant who admits the facts alleged.

A stockholder is not entitled to a peremptory writ of mandamus compelling his corporation to allow him to examine its books and records for discovering the prices at which the corporation bonds which it purchased in the open market for such information was made upon the demand for a written statement of its affairs under the Stock Corporation Law, which latter is controlled by *Matter of Hitchcock*, 824.

Claim for extra work against city — compelling audit.

See MUNICIPAL CORPORATION, 2.

Compelling appointment of local health officer

See PUBLIC HEALTH, 1.

MASTER AND SERVANT.

1. *Negligence — death of workman in manual Act — foreman and superintendent distinguished for neglect of fellow-servant.* In an action for the death of the plaintiff's intestate, based upon

MASTER AND SERVANT—Continued.

the foreman of a gang of men sent out by the defendant to remove an obstruction from one of the sewers, it appeared that while the deceased was in a manhole manipulating a rod for the purpose of removing the obstruction, a sudden rush of water came upon him, and after several futile attempts on the part of those who were at hand to rescue him, he was overcome and drowned.

Held, that under the evidence the alleged foreman was not a superintendent within the meaning of the Employers' Liability Act, so as to entitle the plaintiff to recover on that ground;

That the deceased, an experienced man, elected to do the work in question, knowing all the surroundings, and that he himself directed the removal of a ladder which would have enabled him to escape.

There is a distinction between a foreman or leader of a gang of men and a superintendent such as is described in the Employers' Liability Act.

Where the work is such that the master owes no duty of furnishing a superintendent as a part of the corps of competent fellow-servants, or if he has furnished a competent superintendent and the accident happened through no neglect of such superintendent, but through the error or neglect of a fellow-servant engaged in the carrying out of the details of the work, there is no liability under the Employers' Liability Act. Shanley v. City of New York, 187.

2. Pleading — demurrer — contract of employment construed — right of employee to hearing before discharge — pleading — complaint showing breach of contract of employment — conditions precedent to recovery — performance rendered impossible by act of defendant — practice — leave to plead over. In considering the sufficiency of a complaint the court may consider, not only express allegations, but facts implied therefrom by reasonable and fair intendment.

Where a contract of employment is not for a specified term it may be terminated at will by either party.

Where a contract of employment provided in substance that the employee should not be discharged without a hearing and full investigation with an opportunity to present witnesses in his behalf, and, if found blameless after suspension, should receive full pay for time lost, it should be construed to mean that the employment should continue until dereliction of duty upon the part of the employee was established after a hearing.

Hence, a breach of such contract of employment is shown by an allegation that the plaintiff was discharged without a hearing or full investigation and opportunity to present witnesses in his behalf.

The employee in an action for a breach of such contract need not allege that he was found blameless in order to recover for time lost.

It seems, that the agreement to pay for time lost contained in such contract must be limited to time lost during suspension, and not to time lost through discharge, for the hearing must precede the discharge.

In any event the plaintiff was not required to allege that he had been found blameless as a condition precedent to recovery where the defendant, by refusing a hearing made the performance of the condition impossible.

The plaintiff in such action sufficiently shows performance of conditions upon his part by alleging that he entered the defendant's employ pursuant to the agreement and continued his employment to a certain date. He is not required to negative any claim of dereliction of duty.

Moreover, a failure to perform his duties is excused where the defendant would not permit him to do so.

A defendant, having demurred to a complaint upon the ground that it fails to state facts constituting a cause of action, cannot withdraw the demurrer and answer as a matter of right. He will be required to apply to Special Term for leave to answer, and, it seems, must show a defense upon the merits. *Crotty v. Erie Railroad Co., 282.*

3. Negligence — death by explosion of dynamite — evidence — subsequent precautions. Action to recover for the death of one killed by an explosion of dynamite used for rock excavation. Held, that the jury were justified in finding the master negligent in failing to employ means to give warning to employees that a blast was about to be fired.

MASTER AND SERVANT—Continued.

In such action it is reversible error to allow the plaintiff to show that after the accident the defendant used a whistle to notify employees that a blast was about to be fired. *Iannone v. United Engineering & Construction Co.*, 367.

4. Negligence—*injury to servant piling lumber—obvious risk—contributory negligence.* A plaintiff employed to pile lumber who while endeavoring to reach a platform laid hold of projecting boards on the top of the pile, which he could see were not held in place by the weight of other lumber, cannot recover for injuries received when the boards tipped up allowing him to fall, for he was guilty of contributory negligence.

It is immaterial that the plaintiff was not told to be careful as the danger was obvious. *Cimmer v. Montgomery Brothers & Co.*, 388.

5. Negligence—*injury by fall of piece of a machine—res ipsa loquitur—respondeat superior—when person causing accident not acting for defendant.* Even though the fact that an iron ball fell from a machine in a factory and injured an employee may be *prima facie* proof of negligence of the owner of the factory under the rule of *res ipsa loquitur*, yet where it is sought to charge a manufacturer who had sent its employee to install a machine in a factory with liability it must be shown that the employee at the precise time of the accident was engaged in the work of his employer.

The defendant, a manufacturer, sent its agent to install in a mill a carding machine manufactured by it. It paid the agent's wages but his expenses were paid by the mill owner. Having set up the carding machine and while engaged in bolting thereto another machine not furnished by his master but belonging to the mill he allowed an iron ball to fall from the latter machine so that it resulted in the death of an employee.

Held, that, under the circumstances, the person who caused the ball to fall was not at the time acting for his employer which, therefore, was not liable. *Casey v. Davis & Furber Machine Co.*, 423.

6. Negligence—*death by fall of earth—Labor Law construed—assumption of risk—erroneous charge.* Since the amendment to section 202 of the Labor Law, made by chapter 352 of the Laws of 1910, it is error to charge in an action to recover for the death of a laborer, who was killed in a trench by a fall of earth subsequent to a blast, that the jury may find that, if the defendant was negligent in failing to inspect the bank after the explosion to ascertain whether it was safe and the plaintiff continued to work in the trench knowing of the failure to inspect, he assumed the risk and that the defendant would not be liable.

Having made such erroneous charge, it was further error to refuse to charge that, if the jury found that the fall of earth was due to a defect which could have been discovered by reasonable inspection, the death of the deceased was not due to assumed risk. *Caboni v. Gott*, 440.

7. Action for wrongful discharge—contract construed—evidence on motion for judgment on pleadings A contract of employment contained the following provision: "you [meaning the plaintiff] are to be in all respects subject to such orders as from time to time you may receive from your superiors and to dismissal at any time for incompetence or whenever your dismissal shall in the opinion of the Contractors be for the best interests of the Contractors or the Railway Company. The decision of the said Contractors as to the occasion for any such dismissal shall be final."

In an action for wrongful discharge from employment, *held*, that the contract gave the defendant the absolute right to discharge the plaintiff with or without reason.

On a motion by defendant for judgment on the pleadings before trial the court may consider the plaintiff's bill of particulars and whatever might properly be considered on a motion for judgment at the opening of the trial. *Dineen v. May*, 469.

8. Principal and agent—*when subagent cannot bind his principal by contract of employment.* A manager of one of several advertising departments of a newspaper having no authority whatever to hire subordinates except after consultation with the general manager of the advertising department and with his consent, and who had no power to sign any

MASTER AND SERVANT — *Continued.*

contract of hiring, has no authority to bind his employer by a contract changing a contract employing a subordinate by the week to one employing him by the year without the consent of the general manager. *Sloman v. Star Co.*, 500.

9. *Negligence — injury by revolving derrick — safe place to work — when rule not applicable — change of conditions by servants — assumption of risk — action at common law — Labor Law.* Ordinarily the duty of a master to furnish his servants a safe place in which to work applies to permanent conditions. It does not apply where the place itself is safe but is rendered unsafe by the negligence of fellow-servants.

Thus, where employees in a stoneyard were constantly required to change the position of heavy blocks of stone and placed one of them so near to a revolving derrick that the plaintiff, an employee of thirteen years' experience at the work, was caught between the stone and part of a house at the base of the derrick when it revolved, the master cannot be charged with liability in failing to furnish a safe place to work.

Moreover, considering the length of time the plaintiff had worked in the yard under similar conditions and as he had operated the derrick himself, he was chargeable with knowledge that he might be caught in the manner aforesaid, and when he placed himself in the position where the accident might occur he assumed the risk, the action being at common law.

Section 202 of the Labor Law relating to assumption of risk has no application where the action is at common law. But, *it seems*, that where said statute is applicable it only requires the submission of the assumption of risk to the jury in the first instance and the court may still set aside the verdict on that issue as against the weight of evidence. *Kearney v. Hanlien*, 524.

10. *Negligence — injury by falling into unguarded vat — Labor Law, section 81 — waiver of statute.* Where a servant who fell into a vat in a glue factory while engaged in stirring up the contents, knowing that guard rails furnished by the master were not in place, elected to continue to work without the railing, he waived the benefits of section 81 of the Labor Law requiring vats to be properly guarded and assumed the obvious risks of the situation.

A party may waive a rule of law, statute or constitutional provision enacted for his benefit if it is exclusively a matter of private right and no considerations of public morals are involved; having once done so he cannot subsequently invoke its protection. *Rossiter v. Cooper's Glue Factory*, 752.

11. *Negligence — injury to eyesight by particle of steel — proof not justifying recovery.* Action by a servant against his master to recover damages for personal injuries. The plaintiff was struck in the eye by a flying particle of steel. The injury was alleged to have been caused by the negligence of an incompetent fellow-servant who was engaged in chipping bolts with a chisel. Evidence examined, and held, insufficient to establish either the negligence or incompetency of the plaintiff's fellow-servant, or the negligence of the foreman in appointing him to do the work. *O'Malley v. Morse Dry Dock & Repair Co.*, 788.

12. *Negligence — injury from melted sealing wax — defective receptacle — question for jury.* Action by a servant against a master to recover for injuries received owing to the fact that a cup holding melted sealing wax overturned and burned her. Evidence examined, and held, that the question as to whether the cup furnished by the master was defective was for the jury. *Shafer v. New York Life Insurance Co.*, 797.

13. *Negligence — injury by stepping upon nail — proof not justifying recovery — assumption of risk.* A workman employed in the construction of a building cannot hold his master liable for injuries received when leaving the building at nightfall by stepping upon a nail in a loose piece of planking left upon a runway where the evidence shows that the plank was not there within half an hour of the accident. The master cannot be charged with constructive knowledge that the obstruction was there.

MASTER AND SERVANT — *Continued.*

Moreover, where it appears that in constructing such building loose boards and planks were strewn about, the plaintiff in using the runway to leave the building assumed the risk of the existing conditions. *Tracy v. Hedden Construction Co.*, 851.

Negligence — when decision law of case on new trial.

See APPEAL, 1.

Breach of contract of employment — damages.

See CONTRACT, 7.

Injury to city surveyor — defective ladder — when city not liable.

See MUNICIPAL CORPORATION, 7.

Right of selling agent to receive payment for goods.

See PRINCIPAL AND AGENT, 2.

MECHANIC'S LIEN.

Process — notice of justification of sureties — service on non-resident.

See LIEN, 2.

Claim of defendant against codefendant — right of codefendant to answer.

See LIEN, 3.

When foreclosure suit may be commenced — action by sub-contractor.

See LIEN, 4.

Municipal improvement — judgment against contractor — when sureties not bound.

See LIEN, 5.

Assignment — priority.

See LIEN, 6.

Foreclosure — necessary allegations of complaint.

See LIEN, 7.

MISTAKE.

Contract for driving piles — when no mutual mistake.

See CONTRACT, 9.

MORTGAGE.

1. *Foreclosure — bankruptcy of mortgagor — appointment of receiver — rights of trustee in bankruptcy — stay — remitting action to Federal court — equity.* The fact that the trustee in bankruptcy of a mortgagor has commenced a suit in equity in the United States District Court to set aside as fraudulent a conveyance of the mortgaged premises by the bankrupt, to which action, however, he did not make the holder of the mortgage a party and the fact that an interlocutory judgment has been rendered in his favor in such action is no reason for vacating an order appointing a receiver of the mortgaged premises in a suit of foreclosure brought in the State court.

The rule that where a court of equity of competent jurisdiction has assumed jurisdiction of the subject-matter of a litigation it is entitled to retain the same to the exclusion of all other courts, has no application.

The subject-matter of the litigation in the District Court is merely the title to the property subject to the mortgage, that is, the equity of redemption.

The trustee in bankruptcy by omitting to make the holder of the mortgage a party to the suit in the District Court rendered it impossible for it to protect its rights by the decree in that suit.

There is no authority for remitting the foreclosure action to the Federal court. *Mutual Life Insurance Co. v. Fleischman*, 23.

2. *Foreclosure — sale — power of court to relieve purchaser from bid.* The court in its discretion may relieve a person who has bid in lands on a foreclosure sale from his purchase where it subsequently appears that a person not made a party to the suit claims to be the owner of the equity of redemption and has moved for an order to show cause why the sale should not be vacated and set aside. This is true although the affidavits do not show a positive defect in title, as the purchaser should not be burdened with a threatened law suit. *Koechl v. Gate Development Co.*, 239.

MORTGAGE — Continued.

3. *Foreclosure — rents and profits in hands of receiver — marshaling assets — respective rights of purchaser and second mortgagee in rents and profits — lien of second mortgagee on surplus — interest earned by receiver — interest payable by purchaser on foreclosure.* Rents and profits of mortgaged lands in the hands of a receiver are applicable to the payment of the mortgage debt and costs of foreclosure if the proceeds of the sale are insufficient.

A surplus in the hands of a receiver after the satisfaction of a first mortgage represents the mortgaged estate, and that part of the surplus consisting of rents due after the purchaser on foreclosure makes demand for possession under his deed belongs absolutely to him.

So, too, rents payable in advance and collected by the receiver, but extending beyond the date of the purchaser's demand for possession, should be apportioned to him.

A surplus existing after the foreclosure of a first mortgage should be applied to the satisfaction of a second mortgage, for as that lien is cut off by the foreclosure it is transferred equitably to the surplus.

The purchaser on the foreclosure of a first mortgage and the holder of a second mortgage are not creditors of the same debtor. Hence, although the second mortgagee has other security for his debt, the purchaser on the foreclosure of the first mortgage cannot contend that the lien of the second mortgage does not attach to the surplus, for the equitable rule of marshaling securities applies only where two or more persons are creditors of the same debtor.

Surplus rents and profits in the hands of a receiver after the foreclosure and satisfaction of a first mortgage represent the mortgaged premises and are subject to the lien of a second mortgage; they should not go to the first mortgagee, who bid in the lands on foreclosure. Especially is this so where the order appointing the receiver directed him to hold the surplus subject to the further order of the court.

Where an order directed the receiver on foreclosure to deposit rents and profits with a certain depositary, he should pay to the purchaser only such interest as he actually received, not the legal rate.

A purchaser on foreclosure must pay interest at the legal rate upon any part of the purchase money unpaid after it became due under the terms of sale, whether or no he takes possession. *Continental Insurance Co. v. Reeve*, 885.

4. *Conveyance of part of mortgaged lands — release of remaining lands from lien of mortgage — equity — when rule as to marshaling assets inequitable.* Where a mortgagor conveys part of the mortgaged premises covenanting that it is free from incumbrances there is an implied agreement that the remaining portion shall be devoted to the payment of the mortgage. If the mortgagee, knowing the facts, releases the remaining land there is a discharge of the mortgage to the extent of the value of the land released. But this equitable rule of marshaling assets is not applied if it will injure the mortgagee.

R., owning two lots covered by a single mortgage, exchanged one of them for lands owned by K., both parties covenanting that the lands were to be free from incumbrances. R. refused to release a mortgage on the lot conveyed owing to the fact that the lands conveyed by K. were covered by a mortgage which was not released. Subsequently K. became insolvent and its real estate subject to the lien of judgments. R. conveyed the remaining lot owned by it to C. and the mortgagee assigned the mortgage thereon to the plaintiff while the grantee procured a release of the mortgage on the lands conveyed by K. to R., whereupon the plaintiff released the mortgage on the lot conveyed to C. In a suit by the plaintiff to foreclose the mortgage on the lot conveyed, on which the creditors of K. had acquired liens by the entry of judgments,

Held, that under the circumstances it would be inequitable to apply the doctrine aforesaid and that the plaintiff was entitled to a foreclosure sale as against the judgment creditors of K. *Ridge of Brooklyn Realty Co. v. Offerman*, 878.

Foreclosure.

Archer v. Archer, 918.

Chattel mortgage — priority of lien of livery stable keeper in possession.
See LIEN, 1.

MORTGAGE — *Continued.*

Mortgagee in possession — partition of premises — payment of mortgage prior to distribution of proceeds of partition sale.

See PARTITION, 2.

'MOTOR VEHICLE.

1. *Negligence — collision with automobile — contributory negligence.* In an action to recover for personal injuries alleged to have been caused by a collision with an automobile the plaintiff stated that he was upon a walk in the middle of the street; that he saw a street car coming thirty-five or forty feet away; that he stepped from the platform to cross the car track and was struck by one of defendant's taxicabs. There was no evidence that the taxicab was being operated negligently; that there was any reason for the defendant's driver to anticipate that any one was going to step down from the platform into his pathway, or that the plaintiff had exercised any intelligent degree of care.

Held, that under such circumstances the case should not have been submitted to the jury. *Larner v. New York Transportation Co.*, 193.

2. *Negligence — collision with pedestrian — facts justifying recovery — loan of automobile — when owner liable.* Action to recover for the death of one who having alighted from a street car and while crossing the street was struck and killed by an automobile. No horn was sounded or other signal given. Evidence examined, and *held*, that the negligence of the driver of the automobile and the decedent's freedom from contributory negligence were properly submitted to the jury.

Although the defendant, owner of the automobile, had loaned it to a friend in order to enable him to distribute campaign literature, and although he had power to tell the defendant's chauffeur where to drive and to stop, the jury was justified in finding that the chauffeur at the time of the accident was the agent and employee of the owner, if he alone had full control of the actual management of the car and the person to whom it was loaned in nowise directed or interfered with such management. *Cowell v. Saperston*, 373.

Manufacture of automobile body — rule of substantial performance inapplicable.

See SALE, 1.

MUNICIPAL CORPORATION.

1. *County — public officer — power of board of supervisors — fixing boundary between town and city — power of board to act — legislative function.* The resolution of a board of supervisors, classified in the Constitution as a legislative body, fixing the location of a disputed boundary line between a town and a city within the county, passed by a majority vote of all the members, is a legislative act not subject to judicial review.

The fact that the board upon the hearing of the application of which notice had been given as required by the statute took the sworn testimony of witnesses did not deprive it of its power to act without evidence, the statute not requiring it to be taken.

An act does not become judicial simply because it involves discretion, hearing and determination, and when something like a judicial hearing is adopted by a body not obligated to such course, its power to act is not thereby changed in its nature. *People ex rel. Town of Scarsdale v. Supervisors*, 310.

2. *Waterworks, city of Rome — claim for extra work — proper fund for payment — judgment against city — res adjudicata — collusive audit — right of taxpayer.* A judgment against the city of Rome for extra work done by a municipal contractor in constructing an extension of the water system should be paid, not from the general funds of the city, but from the municipal water fund which under the charter is a separate fund devoted to that purpose and under the control of the board of water and sewer commissioners, if said fund is adequate for payment.

On an application for a peremptory writ of mandamus to compel the board of water and sewer commissioners of said city to pay such judgment, the board cannot question the relator's right to payment, as the judgment is *res adjudicata* as to the liability of the city unless set aside or vacated.

MUNICIPAL CORPORATION — *Continued.*

It seems, that if the audit and allowance of the claim for extra work was collusive or fraudulent, any member of said board who is a taxpayer may maintain an action to have the judgment against the city vacated. People ex rel. Carey Construction Co. v. Smith, 382.

3. Negligence — death caused by hole in pavement — evidence as to size of hole and to cause of death — when municipality not liable. In an action against a city to recover damages for death alleged to have resulted from a fall caused by a hole in the asphalt pavement, there was a conflict of testimony as to the size and depth of the hole in the pavement and as to whether decedent's death resulted from the fall or from typhoid fever.

Held, that the preponderance of the testimony was that the hole at its deepest point was not more than three or four inches in depth, and that this is not such a defect in the highway as rendered the city liable for injury suffered therefrom;

That upon the entire proof it is clear that the decedent died as the result of typhoid fever, with which the fall had no connection. *Duffy v. City of New York, 478.*

4. Examination of municipal corporation before trial — inspection of public records — application for examination denied. The nature of municipal corporations and the functions of officers thereof discussed, per LAUGHLIN, J.

Quare, as to whether sections 870 and 872 of the Code of Civil Procedure relating to the examination of a party before trial apply to a municipal corporation.

As the charter of the city of New York and the General Municipal Law allow the examination of municipal records by taxpayers, and to some extent by the public in general, and provide a summary remedy if the examination be refused, an order for the examination before trial of the city of New York, a party defendant, as to municipal records should be denied where the applicant does not show that it is not a taxpayer and has no adequate remedy under the statutes aforesaid. *Uvalde Asphalt Paving Co. v. City of New York, 491.*

5. Negligence — nuisance — fall of flagpole erected on school building, city of New York — city not liable — liability of board of education — responsibility for neglect of statutory duties. The objection that a notice of intention to bring an action against a city did not comply with the statute cannot be taken for the first time upon appeal, where the complaint alleged that due notice as required by law was given, for had the objection been taken at trial the plaintiff could have amended his pleading so as to show full compliance with the statute.

As under the charter of the city of New York the care and control of public school buildings is given to the board of education and as suits in relation to such property must be brought in the name of said board, although the title to the property is vested in the city — of which charter provisions the court will take judicial knowledge — the city itself is not liable for the death of a person caused by the fall of a defective flagpole erected on a school house.

But an action to recover for a death so caused lies against the municipal board of education either upon the theory that the defective flagpole was a nuisance if originally unsafe, or upon the theory of negligence if it was maintained with knowledge that it had subsequently become dangerous.

It seems, the board of education of said city is liable for the neglect of persons whom it employs to perform duties imposed upon it by statute. McCarton v. City of New York, 516.

6. Paving contract construed — notice to contractor to make repairs — condition precedent to liability — sufficiency of notice — action by assignee to recover balance due on paving contract — assignment of claim by officers of corporation after dissolution. An asphalt paving company contracted with the city of New York to pave certain streets and maintain the pavement in good condition for fifteen years, during which period a portion of the contract price was to be retained by the city and paid to the company in installments at stated periods. It was further provided that, if the company did not repair defects in the pave-

MUNICIPAL CORPORATION — *Continued.*

ment within the fifteen-year period upon receiving notice from the commissioner of public works, the city might make the repairs and deduct the same from any sum due. Subsequently the paving company executed a power of attorney to one B., its attorney, who was also manager of the Barber Asphalt Paving Company, authorizing him to receive and receipt for any moneys becoming due under the contract. Thereafter the paving company was voluntarily dissolved, but B. continued to receive the payments from the city. Later the city, claiming that the Barber Asphalt Company was the "assignee or successor in interest under said contracts," served notice upon said company that if it did not make certain repairs, pursuant to the terms of the contract, the city would cause the work to be done at its expense. The work required to be done by this notice was never performed. In an action by the assignee of the paving company to recover the amount which would have been due from the city had the company kept the pavement in repair after receiving notice so to do,

Held, that the giving of notice to make the repairs was a condition precedent to the paving company's liability;

That the notice given directly to the Barber Company was not notice to the paving company, and consequently it was never in default, and its assignee was entitled to recover.

The fact that the notice was served upon the agent in charge of the work did not make it effective, when it did not call upon the paving company to make the repairs, but upon a third party claimed to be under a duty to make them.

The officers of a corporation, being trustees of its assets after a voluntary dissolution, may execute a valid assignment of a claim for moneys due under a contract. *Asphalt P. & C. Co. v. City of New York*, No. 2, 622.

7. *Negligence — injury to city surveyor — defective ladder not furnished by defendant — when city not liable — pleading — complaint not bringing case within Employers' Liability Act.* At common law a ladder is a simple appliance which a servant uses on his own responsibility. The obligation of a master to furnish safe ladders is created by section 18 of the Labor Law.

A surveyor employed by the city of New York who while running a transit line was directed by one of his superiors to get upon a building by means of a ladder which was found in the vicinity, but was not furnished by the city as part of the engineering equipment, cannot recover of the city for a violation of section 18 of the Labor Law because the ladder broke and he was injured.

A complaint in an action to recover for such injuries which merely alleges that "through the negligence of the defendant and its servants exercising superintendence or acting as superintendent," the plaintiff was injured, does not bring the case within the Employers' Liability Act, for there is no allegation that the alleged superintendent was "intrusted with" superintendence or that his "sole or principal duty" was that of superintendence. *Shute v. City of New York*, 758.

8. *Negligence — injury by fall of floor — when superintendent of buildings not personally liable — obligation to appoint subordinates from civil service list.* As the superintendent of buildings in the city of New York is bound to appoint inspectors of buildings certified as competent by the civil service commission, he is not personally liable for a death caused by the fall of a floor on the theory that he was negligent in not properly inspecting the building, where it does not appear that he had any reason to believe that his subordinates were incompetent. *Voorhees v. Collins*, 828.

Negligence — hole in street — liability of town.

Lynch v. Town of Rhinebeck, 921.

Dismissal of policeman in New York city — evidence.

See CERTIORARI, 2.

Reviewing proceedings of board of supervisors in removing county superintendent of highways from office.

See CERTIORARI, 3.

MUNICIPAL CORPORATION — *Continued.*

Mistake in bid — failure of bidder to execute contract — damages.
See CONTRACT, 3.

Liability of town for injury by defective approach to property.
See NEGLIGENCE, 4.

Action to recover for personal injuries — notice.
See NEGLIGENCE, 10.

Construction of water works — liability of competing company for tax.
See TAX, 1.

See CORPORATION.

NEGLIGENCE.

1. *Landlord and tenant — fall through fire escape — death — pleading — failure to set forth facts showing landlord's duty.* Where in a negligence action plaintiff claims that defendant violated some duty, facts showing the existence of the duty or obligation must be pleaded and proved.

In an action against the owner of a tenement to recover for the death of plaintiff's intestate, who fell through an opening in the fire escape while hanging out clothes on a clothes dryer attached to the rear wall of the tenement, it is necessary to plead and prove facts showing that defendant owed plaintiff's intestate some duty with respect to the maintenance of the clothes dryer and fire escape.

A general averment that defendant owed a particular duty or that the deceased was lawfully on the premises is insufficient.

Where the complaint nowhere alleges that the deceased was a tenant of one of the rear apartments or the servant of such a tenant and alleges no other facts showing defendant's duty to her in regard to the premises, a motion by defendant for judgment on the pleadings should be granted.

While pleadings are to be liberally construed it is necessary that all essential facts be alleged.

The court will not infer that the deceased was the servant of a tenant where no fact is stated from which the inference could be drawn.

It seems, that negligence could not be predicated upon defendant's failure to guard the opening in the fire escape but that the attachment of the clothes dryer to the wall so that one using it might fall through the opening in the fire escape might be either itself negligence or present a situation calling on defendant to exercise care to prevent an accident. Fairchild v. Leo, 31.

2. *Landlord and tenant — death caused by failure to light stairways in tenement house — erroneous nonsuit — objection not taken at trial — Tenement House Law construed — proof raising question for jury.* Action against the owner of a tenement house to recover for the death of a tenant caused by the alleged negligence of the defendant in failing to light the public hallways and the second floor of the building as required by section 76 of the Tenement House Law. Evidence examined, and held, that a nonsuit at the close of the plaintiff's case was error.

The defendant cannot on appeal sustain the judgment entered on such nonsuit upon the ground that the plaintiff failed to prove that tenants cooked in their apartments so as to make the building a tenement house within the provisions of the statute if no such point was made at trial.

It was not contributory negligence as a matter of law for the decedent to use the stairway of the tenement knowing that it was not lighted, for she had a right to use it.

Where the evidence shows that the decedent while attempting to descend an unlighted stairway leading to the entrance of the tenement fell and was killed, her contributory negligence was a question for the jury.

The Legislature, in requiring that a "proper light" be kept burning in a public hallway near the stairs upon the entrance floor of tenement houses, intended that the owner should provide illumination sufficient to light the entire lower stairway, so that persons using the stairs by the exercise of care could see the stairs and avoid stumbling or missing their foothold. Where it appears that no such light was provided during the hours required by the statute, the negligence of the landlord is a question of fact for the jury. *Bornstein v. Faden, 37.*

NEGLIGENCE—Continued.

3. *Liability of contractor for injurious piled in street—evidence—against sub-contractor.* In an action for personal injuries against the defendants, who were the contractors for the progress of the work the sidewalk being obliged to turn into a causeway, was injured by one of the iron beams in the construction of a bridge which had been insecurely piled.

Held, that the dismissal of the case was error;

That the fact that the beams were not relieved from liability does not relieve the defendants from liability from the evidence that the injury was caused by the beams by them. *Kane v. Simons*

4. *Highways—Injury by defective lighting of town—duties of town subject to common law for personal injuries.* The present liability of a town is wholly the same as that of a private individual.

Section 73 of the Highway Law does not require a town to make repairs to a wooden driveway leading to the lands of an abutting owner an thereof, where he was not directed to do so by the board.

Nor can the superintendent proceed to compel him to repair such driveway unless such repairs by the district or county.

A town is chargeable with the negligence in failing to call the attention of the town which he had knowledge, leading from the facts as section 47 of the Highway Law imposes a duty of inspection.

But, it seems, no charge of negligence can be made against a town if the town board fails to act after *Ferguson v. Town of Lewisboro*, 232.

5. *Injury to electrician repairing electrical equipment—Inadvertent discharge of jury—when no mistrial.* Action for damages against an electrician, who was seated on the top of the shaft when the car ascended to the top of the shaft and knew of the operator of the elevator not to go up as he had promised not to do. It appeared that he stepped from the elevator before it started while it was running. On all the evidence

Held, that the jury were justified in finding contributory negligence.

The trial court submitted to the jury the question of negligence and the contributory negligence of the plaintiff as three specific questions to be answered as to damages should they find the defendant negligent. During the trial the defendant was negligent and the plaintiff was not negligent but could not agree on the question of damages. The foreman informed the court that the plaintiff, in his opinion, had answered the first two questions in the affirmative. The court believing that the first question had been answered in the affirmative by the plaintiff, discharged the jury, but they had found the plaintiff guilty of negligence. The defendant, however, directed the jury to disregard the verdict on the first two questions and to direct a judgment for the defendant.

NEGLIGENCE — Continued.

Held, that the action of the court in directing the jury to retire was proper under the circumstances and that there had been no mistrial. *Rippley v. Frazer, 309.*

6. Injury by fall of derrick boom — accident caused by failure to inspect — erroneous charge — improper use of derrick — appeal — new trial — submission of case on erroneous theory. Where personal injury caused by the boom of a derrick rented to the plaintiff's master by the defendant, who furnished the engineer and another man for operating it was caused not by the negligent operation of the appliance, but, on the contrary, was due to a failure to inspect the appliance which might or might not have disclosed the fact that a key in the braking apparatus had worked loose, it is error to allow the jury to find the defendant negligent in failing to exercise due care in using the derrick, for the only basis for negligence was the failure to inspect and repair.

For such error a new trial will be granted although there is no exception to the charge, for the jury might have found that a proper inspection would not have revealed the looseness of the key. *Miles v. Terry & Tench Co., 521.*

7. Injuries caused by falling joist — action by ironworker against codefendants — complaint — evidence — contributory negligence. A complaint in an action by an ironworker against a general contractor and two sub-contractors to recover for injuries received while working in an elevator shaft on a scaffold at the sixth floor, which, after the usual statements, alleges that "the scaffold or planking on which he was standing was struck violently by a heavy wooden joist that was allowed to and did drop down and through said elevator shaft from above the plaintiff and from about the tenth floor of said building, through and by reason of the fault, carelessness and negligence of the defendants, their agents, servants and employees," thereby causing the scaffolding to give way and precipitating the plaintiff down the shaft, states a good cause of action.

A complaint in an action for negligence which states the act or omission causing the injury, with a general allegation that such act or omission was due to the defendant's negligence, is sufficient.

In such an action there must be sufficient evidence of negligence independent of the presumption caused by the falling of the object to identify the wrongdoer.

The plaintiff was not guilty of contributory negligence, as matter of law, in neglecting to build a cover over his scaffold. *Anderson v. McNulty Brothers, 735.*

8. Defective scaffold erected by general contractor — liability to employee of sub-contractor — Labor Law, section 18, construed. A sub-contractor, who does no act in reference to the furnishing of materials or the construction of scaffolds, but merely sends his employees to a building where they use the scaffolds erected by the general contractor for the use of his own employees, is not liable under section 18 of the Labor Law, if the scaffold fails.

It seems, that if it becomes necessary for a sub-contractor to construct scaffolds he will be charged with the duty of complying with the statute.

A sub-contractor has the right to assume that the platforms or scaffolds which have been constructed and which are in common use when he or his servants come upon the work have been constructed so as to comply with the provisions of the statute.

It seems, that whoever assumes the duty of constructing the scaffolding for the general purposes of the construction of a building must, under the statute, assume the responsibility for their materials and construction, so long as they are maintained for that purpose, and that any one lawfully at work on such building, using the scaffolds, must look to the person who furnished the materials or who had charge of the construction for any liability under the statute. *Bonhoff v. Fischer, 747.*

9. Injury to pedestrian by fall on icy sidewalk — failure of abutting owner to comply with municipal ordinance. The owner of lands abutting on a city street is not liable for injuries sustained by a pedestrian who fell upon accumulated ice although, after sweeping newly-fallen

NEGLIGENCE—Continued.

snow from the pavement as required by the city ordinance, he did not strew the sidewalk with ashes or similar material which was also required by the ordinance.

The owner of real property is not liable for injury to a pedestrian sustained through a failure to comply with the requirements of a municipal ordinance. *Connolly v. Bursch*, 772.

10. *Highways—action for personal injuries—notice to town—failure to state time and place of accident—proof not justifying recovery.* While the statute requiring the plaintiff intending to sue a town for injuries received by reason of a defective highway to serve a verified statement of the causes of action as a condition precedent thereto does not in express terms require the notice to state the time and place of injury, a notice which fails to do so is defective.

Action against a town to recover for the alleged negligence of the highway commissioner in failing to remove bushes or limbs of trees extending into the highway, by reason of which the plaintiff, driving upon the highway was struck in the eye and blinded. Evidence examined, and held, insufficient to justify a recovery. *Lutes v. Town of Warwick*, 809.

11. *Injury caused by caving in of sewer excavation—evidence—prospective liability of city contractor and gas company.* Separate actions against the city of New York, a municipal contractor engaged in constructing a sewer, and a gas company as codefendants to recover for the death of a child who fell into the sewer excavation when the street caved in subsequent to an explosion, and also to recover for the death of an employee of the contractor working in the excavation at the same time. Evidence examined, and held, that in the action to recover for the death of the child nonsuits as against the contractor and the city should be reversed while a nonsuit as to the gas company should be affirmed;

That in the action to recover for the death of the employee a nonsuit as to the contractor should be reversed while a nonsuit as to the city should be affirmed. *Brady v. City of New York*, 816.

Action to recover for death.

See DAMAGES.

Action against attorney—burden of proof.

See DECEASED'S ESTATE, 1.

Death caused by hole in pavement.

See MUNICIPAL CORPORATION, 8.

Nuisance—fall of flag pole from school building—when city not liable.

See MUNICIPAL CORPORATION, 5.

Injury to city surveyor—defective ladder.

See MUNICIPAL CORPORATION, 7.

Injury by fall of floor in New York city—when superintendent of buildings not personally liable.

See MUNICIPAL CORPORATION, 8.

See MASTER AND SERVANT, 1, 8-6, 9-13.

See MOTOR VEHICLE, 1, 2.

See RAILROAD, 1, 2, 5.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

NEW YORK CITY.

1. *Eminent domain—closing street in city of New York—damage to abutting owners—evidence—review of determination of commissioners—jurisdiction of commissioners to determine question of title—when street deemed closed—right to damages under Laws of 1895, chapter 1006, section 6.* Where, in a proceeding instituted by the city of New York for the appointment of commissioners to ascertain and determine the damages caused to abutting owners by the closing of a street, the evidence with respect to the value of the parcel and to the damage caused thereto by closing the street is conflicting and no theory is presented by the witnesses called by the city or by the owner upon which it can be determined with any degree of certainty what the value of the property was before the street was discontinued, or what its value is with the street

NEW YORK CITY—Continued.

closed, the case is one in which the personal view of the commissioners must be given great weight, and their determination as to the amount of damages should not be disturbed where there is no basis in the evidence for doing so.

In a proceeding instituted to determine the damages caused by closing a street, the principle that a party attempting to acquire title to property by eminent domain cannot claim that it already has the title or easement which it seeks to condemn, does not apply, and the commissioners have jurisdiction to determine the question of title.

A street is deemed legally closed for the purpose of determining who are entitled to an award of damages, not at the time the award for damages is made, but at the time that the essential statutory steps have been taken and the right to damages then accrues.

Ordinarily the right to damages under section 6 of chapter 1006 of the Laws of 1895 depends upon the claimant being an abutting owner on the part of the street discontinued, but the statute is very broad and may be reasonably construed to embrace the claim of a party whose property is left without present access or the prospect of access in the immediate future, although he is not an abutting owner. *Matter of City of New York (West 151st Street)*, 55.

2. Street opening—section 1007, Greater New York charter, construed—assessment against and award to same party—offset—interest on award. Section 1007 of the Greater New York charter, as to the award of damages and benefits resulting from the opening of streets, specifically confers upon the landowner the right to extinguish, without interest, an assessment for benefits to the extent that an award has been made for damages. It contemplates that there shall be, without action upon the part of the landowner, an application of the award for damages towards the payment of the assessment for benefits, and that this application shall be made as of the date when the assessment becomes payable; that one shall be offset against the other.

Hence, where an assessment for benefits to a landowner is in excess of an award to him for damages, he is not entitled to interest on the award after the assessment for benefits becomes payable.

The fact that a landowner, after the refusal of the comptroller to comply with his demand as to the payment of interest on his award after his assessment for benefits became payable, voluntarily paid the entire assessment for benefits, does not change the relation of the parties. *Matter of Fischer*, 618.

3. Municipal corporations—widening street, city of New York—effect of widening on grade—damages. Where on the widening of a street in the city of New York the land of an abutting owner was left below grade owing to the natural contour of the land, but the grade of the street itself was not changed, commissioners acting under the authority of chapter 537 of the Laws of 1893, as amended, have no authority to award the owner substantial damages. *People ex rel. City of New York v. Dickey*, 678.

4. Municipal corporations—section 284 of the Greater New York charter construed—appointment of patrolman—age qualification. Section 284 of the Greater New York charter, as amended by Laws of 1903, chapter 612, and Laws of 1907, chapter 278, providing that "no person shall be appointed patrolman who shall be at the date of placing his name on the civil service eligible list over thirty years of age," means that the applicant shall not be over thirty years of age at the time of the final completion of the whole process of examination and the computation of the result.

Hence, an applicant for patrolman, who after passing all his examinations becomes thirty years of age seven days before his name is placed upon the eligible list, is disqualified. *People ex rel. Smith v. Creelman*, 716.

Dismissal of policeman.

See CERTIORARI, 2.

Mistake in bid on municipal contract—failure of bidder to execute contract—damages.

See CONTRACT, 3.

NEW YORK CITY — *Continued.*
 Magistrate's Court — trial of offense
See COURT.

Construction of bridge across grade.
See EMINENT DOMAIN.

Fall of flag pole from school building of education.
See MUNICIPAL CORPORAT.

NUISANCE.

Suit to abate nuisance — issues in other — when judgment for plaintiff, a suit in equity brought by the city of two street railroad companies to have one of the companies have intervened in respect to which of the nuisance and pay the expense thereof interest, the court need not delay judgment between the defendants is decided, before determination. *City of New York v.*

Fall of flag pole from school building city and board of education.

See MUNICIPAL CORPORATIO

PARENT AND CHILD.

Misjoinder of actions — joinder of a parent's guarantee.

See PLEADING, 6.

PARTITION.

1. *Determination of rights of a specific issue — judgment in action — trial — evidence — presumption — loss — essential — computation of period —* An action for partition may be maintained adversely. The right, title and be determined in the action as in partition.

The fact that a judgment has been rendered in the exclusion of evidence does not consider all other points of attack.

Where a judgment for the plaintiff has been directed by the Appellate Division costs by the defendant under the new trial in such action, the judgment involved it was decisive as to the law.

In order that there may be a presumption of open possession of lands for over prove circumstances indicating the presumption made. The presumption exists where possibility of a grant.

The time of possession of lands necessary of a lost grant cannot, under the law years.

Even assuming that trustees interconveyance lands which they were claimed thereunder where the deed shown that the grantee ever entered deed.

Where adverse possession though by an action of partition was not continued possession of another person against ejection was brought, a subsequent action tacked on to the prior possession in possession required by the statute.

PARTITION—Continued.

2. *Pleading — claim of ownership by adverse possession and rights as mortgagee in possession — mortgagee in possession not deprived thereof until mortgage paid — payment of mortgage prior to distribution of proceeds in action of partition — evidence — payment — presumption.* Although defendants in an action of partition claim ownership by adverse possession, their rights as mortgagees in possession after default can be determined if that right is also asserted by answer.

A mortgagee lawfully in possession after default of the mortgagor will not be deprived of possession until the mortgage has been paid; the possession need not have been given under the mortgage nor with a view thereto.

The right of a mortgagee lawfully in possession after default to have the mortgage paid prior to the distribution of proceeds in an action of partition, may be established upon very slight evidence.

Where a mortgagee is lawfully in possession after default, there is no presumption of payment of the mortgage arising after the expiration of twenty years. *Becker v. McCrea*, 211.

PARTNERSHIP.

Action to recover part of mutual debt paid by one party — defense of mutual accounting and settlement. Where a complaint alleges that the parties were formerly partners in business; that upon a certain date they agreed upon a statement of their assets and accounts and agreed that a certain debt should be paid in part by notes; that thereafter the firm assets were divided, but the outstanding notes were overlooked and were subsequently paid by plaintiff, who seeks to recover one-half the amount thereof, and there is no allegation that there was ever any settled account made between the parties, but the complaint proceeds as if none had ever been made, and the answer as a separate defense sets up that after the mutual statement alleged in the complaint the parties continued in business for three years, at which time the assets were divided and the parties "mutually agreed and intended that said division should operate as a dissolution of said firm, and a final settlement of their respective interests in the said firm and its property and assets, and of all claims and other matters" between the parties, the issue raised by said separate defense should be tried before the other issues.

It is manifest that, if the decision on this issue should be in defendant's favor, the litigation would be at an end, for, if the accounts had been finally settled by mutual consent it is too late for plaintiff to assert a claim against defendant arising out of the partnership affairs included in the settlement unless the settlement itself be first attacked and set aside. *Pemberton v. McAdoo*, 20.

Dissolution — undertaking by one partner to pay firm debts — action against surety.

See GUARANTY AND SURETYSHIP.

Liability as partner — separate trial of issue.

See TRIAL, 2.

Bequest of interest in partnership — rights of legatees.

See WILL, 7.

PARTY.

Action by holder of note — deposit of amount due by indorser — real party in interest.

See BILLS AND NOTES, 1.

Examination before trial.

See DISCOVERY, 1-3.

Examination of municipal corporation before trial.

See MUNICIPAL CORPORATION, 4.

Examination of corporation before trial.

See PRACTICE, 2.

PAUPER.

See POOR LAW.

PENAL CODE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxii.]

PENAL LAW.

[For table containing all sections cited in this volume, see *ante*, p. lxii.]

PERJURY.

Inciting another to commit.

See CRIME, 2.

PLEADING.

1. *Practice—motion for several kinds of relief—false representations—making complaint more definite and certain—bill of particulars.* It is proper practice under section 768 of the Code of Civil Procedure, as amended, to move at the same time for several kinds of relief in the alternative or otherwise.

Where upon a motion to make a complaint more definite and certain, to require plaintiff to separately state and number the causes of action and for a bill of particulars, it appears that the complaint alleged that plaintiff bought of defendants over 30,000,000 pounds of paper stock; that defendants represented that the same was of a certain quality and that said representations were false to defendants' knowledge and were made with intent to and did deceive plaintiff to its damage in a certain sum and the moving affidavits show that the defendants were merely middlemen; that the first transaction between the parties occurred over eight years before the suit and that their mutual dealings extending over a number of years involved a large number of separate shipments, the plaintiff will be compelled to make the complaint more definite and certain so as to show whether it intends to allege that there was but one transaction or several, and whether it is suing on one contract or several different ones.

Also, if it appear that several separate contracts of sale are being sued upon, they must be separately stated and numbered; if, on the other hand, it appear that but one contract is being sued upon, then the transaction is of such a peculiar and unusual character that plaintiff should furnish a bill of particulars thereof.

It seems, that a large number of causes of action have been united in one allegation and that there could not have been but one sale preceded or accompanied by fraudulent misrepresentations in regard to such a large quantity of paper stock. *Barrett Manufacturing Co. v. Sergeant*, 1.

2. *Failure to separately state and number causes of action.* Where, in an action to recover damages for deceit, the plaintiff alleges that he was induced by false and fraudulent representations made by the defendant, the publisher of a newspaper, to enter into a contract to act as its advertising manager, that later he entered into a similar contract and that this contract "was subsequently renewed for each of the years 1908, 1909 and 1910," he attempts to set forth five different causes of action, and will be compelled to separately state and number them as required by section 483 of the Code of Civil Procedure. *Fischer v. New Yorker Staats-Zeitung*, 48.

3. *Demurrer—action to recover for death by wrongful act—misjoinder of parties—complaint stating single cause of action.* A demurrer to a complaint against two defendants to recover for the death of the plaintiff's intestate, on the ground that causes of action have been improperly united, is not well taken even though the plaintiff has attempted to state separate causes of action against the respective defendants, if in fact but a single cause of action is pleaded against them as joint tort feasors. *Sartori v. Litchfield Construction Co.*, 241.

4. *Bill of particulars—specific performance—form of order—staying further prosecution—abstract of title.* An order requiring the plaintiff in a suit for the specific performance of a contract for the exchange of real estate to furnish a bill of particulars is unauthorized in so far as it stays further prosecution until the particulars are furnished.

A direction in the order that plaintiff furnish in the bill of particulars an abstract of her title is not justified, as the same is a matter of public record. *Borgrosser v. Risch*, 248.

PLEADING — Continued.

5. *Bill of particulars — request for defendant's "claim" — when order for particulars improper — precluding giving of evidence.* A demand for a bill of particulars of the defendant's "claim" includes both defenses and counterclaims alleged.

An order for a bill of particulars should not require the defendant to disclose to the plaintiff substantially all the evidence in his possession necessary to support his claim.

It is premature to include in an order for a bill of particulars an order precluding the party from giving evidence if he fails to furnish the particulars required.

Order for a bill of particulars examined and modified. *Posner v. Rosenberg*, No. 1, 270.

6. *Misjoinder of actions — joinder of action against infant with action on parent's guarantee — Justice's Court — practice — objection to misjoinder of actions.* An action against an infant on a contract whereby he was to receive instruction from the defendant cannot be united with an action against his parent on a collateral contract guaranteeing payment by the infant.

Where in an action in a Justice's Court the allegations against said defendants are sufficient to constitute separate actions against each, the misjoinder cannot be attacked by demurrer although it appears upon the face of the complaint.

While the Code of Civil Procedure does not prescribe the remedy available to a defendant in a Justice's Court for a misjoinder of actions, it seems that the objection to the defect should be raised in the answer by plea in abatement.

The objection to the misjoinder of actions aforesaid is sufficiently raised in a Justice's Court where the answer alleges that there was a misjoinder of parties defendant, that the parties could not be joined in a single cause of action, etc. *International Text Book Co. v. Fox*, 369.

7. *Action for an accounting — motion to compel plaintiff to separately state and number causes of action — to make complaint more definite and certain — to strike out irrelevant matter.* Where the complaint, in an action for an accounting, contains, in addition to allegations appropriate to such an action, averments respecting breaches of agreement to indemnify and respecting alleged conversions relating to the acts of the defendant as agent and trustee of the plaintiff and, therefore, relevant to the single cause of action for an accounting, the plaintiff should not be directed to separately state and number the causes of action.

It seems, that where an application is made to make a complaint more definite and certain by stating a mass of details, which might more properly be obtained by a motion for a bill of particulars, the court is not called upon to sort out these matters which may properly be the subject of the motion, unless it appears to be necessary to protect or preserve a substantial right.

Motions to strike out irrelevant allegations are not favored and are granted only when it is evident that, if denied, the moving party will be prejudiced, and denied unless it is plain that the adverse party will not be harmed. *Baruch v. Young*, 466.

8. *Amendment of answer — defenses not available against complaint as drawn — costs.* Where a complaint on an account stated alleged a written statement of account and a promise in writing to pay the same, but the proof at trial showed an account stated by implication resting on parol evidence rather than by express agreement, the defendant should be allowed to amend his answer so as to plead the Statute of Limitations, the Statute of Frauds and a discharge in bankruptcy prior to the statement of account, these defenses not being available as against the complaint as drawn.

On granting the amendment under the circumstances aforesaid the defendant should not be required to pay full costs to the date of the application; only motion costs should be imposed. *Lord & Taylor v. Hatch*, 608.

9. *Bill of particulars — when bill sufficient — costs — amendment.* The plaintiff in an action to recover for the breach of the defendant's contract to buy articles to be manufactured by the plaintiff for the construction

PLEADING — *Continued.*

of a building, claiming that he had partially executed the contract before the defendant repudiated it, should not be required to give a bill of particulars stating the number of men employed by him and who would probably have been employed in completing the contract.

The plaintiff should not be charged with ten dollars costs as a condition requiring the defendant to accept his bill of particulars where the bill as originally served on the defendant's demand was proper.

Where the bill of particulars served on demand was sufficient an order requiring the bill of particulars should not contain a clause precluding the plaintiff from introducing evidence of the particulars required by the order.

The plaintiff should not be charged with costs as a condition for an amendment of his complaint, if the cause of action is not changed and the amendment would have been allowed at trial if justified by the proof. *Pomeroy Co. v. Wells Brothers Co.*, 673.

10. *Amendment of complaint on contract to allege conversion — Statute of Limitations — amendment denied.* The plaintiff in an action against a common carrier for breach of contract seeking to recover the value of jewelry which was removed from his trunk while in the possession of the defendant, and who has failed to recover on the ground that he misled the defendant as to the contents of the trunk, and paid only the rate for the carriage of ordinary baggage, should not, after the Statute of Limitations has run, be allowed to amend his complaint so as to seek a recovery for conversion. *Nathan v. Woolverton*, 791.

Breach of contract.

Carlin Construction Co. v. New York & Brooklyn Brewing Co., 919.

Bill of particulars — action against payee of note as indorser.

See BILLS AND NOTES, 7.

Breach of contract — failure to allege non-payment of price.

See CONTRACT, 7.

Remedy for indefiniteness of complaint.

See CONTRACT, 10.

Amendment on trial.

See CORPORATION, 8.

Complaint — slander of title to real property — insufficient allegations as to damage.

See LIBEL, 1.

Libel — not necessary to allege that communication was not privileged.

See LIBEL, 3.

Mechanic's lien — claim of defendant against codefendant — right of codefendant to answer.

See LIEN, 3.

Foreclosure of mechanic's lien — complaint — amendment upon trial.

See LIEN, 7.

Complaint — breach of contract of employment — conditions precedent to recovery — performance rendered impossible by acts of defendant — demurrer.

See MASTER AND SERVANT, 2.

Motion for judgment on pleadings — what may be considered.

See MASTER AND SERVANT, 7.

Complaint not bringing case within Employers' Liability Act.

See MUNICIPAL CORPORATION, 7.

Death by fall through fire escape in tenement — failure to allege facts showing duty of landlord.

See NEGLIGENCE, 1.

Negligence — sufficiency of complaint.

See NEGLIGENCE, 7.

Partition — claim of ownership by adverse possession — mortgagee in possession.

See PARTITION, 2.

PLEADING—Continued.

Judgment on pleadings — action against real estate broker — complaint stating cause of action.

See PRACTICE, 2.

Supplemental complaint — death of one defendant — reviving action.

See PRACTICE, 4.

Frivolous demurrer — judgment.

See PRACTICE, 5.

POLICE.

Dismissal of policeman in New York city.

See CERTIORARI, 2.

Age qualification for policeman in New York city.

See NEW YORK CITY, 4.

PRACTICE.

1. *Separate trial of issues.* It is correct practice in a proper case to order a separate trial of one issue prior to the trial of the other issues. *Pemberton v. McAdoo*, 20.

2. *Motion and order — demand for alternative relief — section 768 of the Code of Civil Procedure construed — judgment on pleadings — complaint stating cause of action — action against real estate broker — discovery — examination of corporation before trial.* A defendant moving for judgment on the pleadings may as alternative relief ask for an order vacating an order for an examination before trial.

Such alternative relief is authorized since section 768 of the Code of Civil Procedure, as amended by chapter 768 of the Laws of 1911, the purpose of which amendment is to allow either party to a motion to demand such relief as he deems himself entitled to upon the facts presented in order to save time to the court and expense to litigants.

A motion for judgment on the pleadings should not be granted upon the ground that the complaint fails to state a cause of action where it alleges that the defendant, a real estate broker, having the exclusive right to rent offices leased by the plaintiff, induced him to vacate and promise to pay commissions in reliance upon the defendant's absolute undertaking to obtain a sub-tenant, and upon his statement that he had obtained one, substantial damages being pleaded.

Where the defendant in such action is a corporation and the plaintiff shows that the agreement upon which he bases his action was made with one whom he understood to be the defendant's authorized agent, he is entitled to examine the defendant before trial in order to show the agent's authority. Only one, not two, of the defendant's officers should be examined. *Chapman v. Read*, 52.

3. *Motion to intervene as defendant — action on contract — assignee of moneys due.* On the trial of an action by a trustee in bankruptcy to recover a balance due the bankrupt on a municipal contract, the court has no power over plaintiff's objection to grant a motion permitting a bank to which the bankrupt had duly assigned a portion of the money due or to grow due on the contract to intervene.

The fact that the city certified at the inception of the contract that it had the money to pay for the work and the fact that the complaint alleges that other funds in the city's possession are applicable to the payment of plaintiff's claim do not show that the plaintiff seeks payment from a specific fund. *Oppenheimer v. City of New York (Chelsea Bank)*, 172.

4. *Pleading — supplemental complaint — death of one defendant after original complaint had been answered — reviving action — failure of representative to answer supplemental complaint — default — vacating judgment.* The purpose of a supplemental pleading is to set up facts occurring since the beginning of an action, or facts which had theretofore occurred but were unknown to the pleader.

Where, in an action against partners for goods sold and delivered, an order reviving the action against the administratrix of a defendant who had died since the service of the defendants' answer did not provide that a supplemental complaint, permitted by section 760 of the Code of Civil Procedure, should take the place of the original complaint, it is error to enter judgment by default against the administratrix, who did not

PRACTICE — Continued.

appear in the action, because of her failure to answer the supplemental complaint in so far as it repeated allegations of the original complaint. *Casussa v. Scavarese*, 243.

5. *Frivolous demurrer — motion for judgment.* While a motion for judgment is authorized where a demurrer is frivolous, *it seems* that the preferable practice is to move under section 547 of the Code of Civil Procedure authorizing judgment upon the pleadings after issue joined. *Posner v. Rosenberg*, No. 2, 272.

6. *Section 768, Code Civil Procedure, construed — amendment of motion papers — amendment of pleading not authorized.* Section 768 of the Code of Civil Procedure, as amended by chapter 768 of the Laws of 1911, providing that a motion shall not be denied for defects in the moving papers which can be cured upon the hearing or before entry of the order, does not permit the court, on a motion to change the place of trial, to allow the defendant to amend his answer. Leave to amend the pleading must be obtained by motion made at Special Term for that express purpose. *Kelley v. Ward*, 448.

7. *Interpleader — separate actions by widow and son to recover benefit from fraternal organization.* Where a widow and a son of a deceased member of a fraternal organization obligated to pay a death benefit to the person entitled thereto bring separate actions to compel the payment of such benefit, the defendant organization, admitting its liability but being honestly in doubt as to which plaintiff to make the payment, is entitled to an order of interpleader under section 820 of the Code of Civil Procedure. *Natowitz v. Independent Order Ahawas Israel*, 607.

8. *Security for costs — removal of plaintiff from State — laches — amount of security.* Where, at the time of the commencement of an action for negligence, the plaintiff resided in the county of Westchester, but pending an appeal from a judgment of nonsuit resulting in a new trial returned to Italy, an application by the defendant's attorney, upon hearing that plaintiff was about to return to this State after a period of six years, for an order requiring him to give security for the costs on the ground that he had ceased to be a resident of the State should not be denied on the ground of laches, it having been substantially agreed between the attorneys that the matter should remain dormant until the plaintiff returned.

An order requiring security for costs in an amount double that authorized by sections 8272 and 8273 of the Code of Civil Procedure is irregular and should be reversed. *Di Stefano v. Peekskill Lighting & Railroad Co.*, 745.

9. *Dismissal — neglect to prosecute — purpose of dismissal.* Where a case was noticed by both parties and appeared upon the general Trial Term calendar in 1909, and a new calendar to include the causes remaining on the general calendar was made for the term commencing with the first Monday of October, 1911, and it is claimed that the plaintiff by neglect to file a new note of issue has failed to place one case upon the new calendar for a period of two months, during which time junior issues have been reached and disposed of, and the affidavit of the plaintiff's managing clerk, that he filed a note of issue for this case and for 150 others, for the purpose of having the case appear upon the October calendar, is not contradicted, a motion under section 822 of the Code of Civil Procedure to dismiss the plaintiff's complaint for want of due diligence in the prosecution of the same should be denied.

The fact that calendars are crowded and that it takes a long time to reach a case is not to be charged against a plaintiff; the question is not how long it has been since issue was joined but whether the plaintiff has unreasonably neglected to proceed.

The purpose of dismissing a complaint for unreasonable neglect to proceed is to prevent an unreasonable carrying of cases upon the calendar which are not designed to be tried. *Leap v. Associated Operating Co.*, 859.

10. *When reply ordered.* As a general rule when new matter set forth in a plea in bar is of such a character that, if true, it will constitute a complete defense to the action unless in some manner it is avoided, it will simplify the issue and prevent surprise at the trial if a reply is ordered pursuant to section 516 of the Code of Civil Procedure showing the grounds

PRACTICE — *Continued.*

of avoidance, if such exist; but no absolute rule can be formulated applicable to all cases in accordance with which such motion should be granted or denied. *Schweitzer v. H. A. P. A. Gesellschaft*, 900.

Dismissal of complaint for failure to prosecute.

Bryan v. Safr, 908.

Submission of controversy — statement of facts.

See BILLS AND NOTES, 2.

Remedy where return to writ of certiorari is defective.

See CERTIORARI, 1.

Action by contractor on *quantum meruit* — damages — offset by owner.

See CONTRACT, 2.

Negligence action — motion to set aside assessment of damage.

See DAMAGES.

Examination of party before trial.

See DISCOVERY.

Injunction *pendente lite*.

See INJUNCTION.

When costs noticed by plaintiff should not be stricken from calendar.

See LIEN, 3.

When return to writ of mandamus conclusive.

See MANDAMUS.

Leave to plead over after demurrer.

See MASTER AND SERVANT, 2.

Motion for judgment on pleadings — what may be considered.

See MASTER AND SERVANT, 7.

Motion for several kinds of relief — making complaint more definite and certain — bill of particulars.

See PLEADING, 1.

Action to recover for death — misjoinder of parties.

See PLEADING, 3.

Staying action pending service of bill of particulars — when improperly ordered.

See PLEADING, 5.

Justice's Court — objection to misjoinder of actions.

See PLEADING, 6.

Motion for several kinds of relief in the alternative.

See PLEADING, 7.

Amendment of answer — costs.

See PLEADING, 8.

Service upon corporation.

See PROCESS, 1.

Service of summons upon non-resident plaintiff while attending trial.

See PROCESS, 2.

Retention of report of referee pending payment of fees.

See REFERENCE.

Separate trial of one issue.

See TRIAL, 2.

[For table containing all sections of the Code of Civil Procedure cited and construed in this volume, see *ante*, p. lxi.]

See APPEAL,

See NEW TRIAL.

PRINCIPAL AND AGENT.

1. *Insurance — cancellation of contract with general agent — action for breach — defense.* Where an insurance company cancels a five-year contract with its general agent within a certain territory and notifies the agent to discontinue business therein and cancel all outstanding policies, it is no defense to an action for breach of contract that an assignment of

PRINCIPAL AND AGENT—Continued.
the agent's claim for damages to the plaintiff was itself a breach of the contract of agency. *Searcy v. Casualty Company of America*, 316.

2. *Selling agent—right to receive payment—ratification.* Ordinarily an agent selling an article not in his possession is not authorized to receive payment. This rule, however, is not inflexible; its application depends upon the circumstances of the case.

Where plaintiff upon the order of his agent shipped a fire engine to defendant and the latter paid the purchase price to the agent, and so wrote to plaintiff when he sent him his bill, and plaintiff thereupon for nearly three months endeavored to obtain the money from the agent, using every means to do so, and neither answered defendant's letter nor intimated that the payment to the agent was unauthorized, he by his conduct ratified and assented to the payment as made, and cannot later hold defendant for the price of the engine on the ground that the agent had no right to receive the money.

The plaintiff was under an obligation when notified that defendant had paid the account to the agent to advise defendant promptly if he wished to repudiate the agent's authority. *Goldstein v. Tank*, 341.

3. *Action against undisclosed principal—rescission of contract—evidence of agency—election of remedies—estoppel.* One E., upon the faith of an advertisement signed by K. in a financial bulletin offering bonds for sale under certain conditions, sent to K. a certain sum in full payment for one bond. K. then wrote to E. and suggested that he change his order and purchase another class of bonds. E. accepted the suggestion and sent a draft for the difference in price, but never received the bond for which he subscribed. K. subsequently became a bankrupt and E. filed a claim which was allowed but never paid, there being no assets. Long after the filing of this claim E. was advised that he had a cause of action against the Douglas Copper Company, and thereupon executed an assignment to R., who subsequently assigned the claim to S., the plaintiff, who brought an action against the Douglas Copper Company as an undisclosed principal of K. to recover the amount paid for the bond, alleging a rescission of the contract between R. and the Douglas Copper Company.

Held., that under the evidence K. was the agent of the defendant;

That the allowance of the claim in bankruptcy against the agent was not such an election as estopped pursuit of the principal, the defendant company, as at the time of the filing of the claim in bankruptcy E. had no knowledge of the relation between K. and the defendant.

An election of remedies in order to create an estoppel must be predicated upon full knowledge of the facts. *Sweeney v. Douglas Copper Co.*, 568.

4. *Insolvency of broker selling stock on the exchange—rights of owner—closing contracts with insolvent firm—undisclosed principal.* A broker, pursuant to instructions from an owner of stock, sold certain shares upon the exchange in the ordinary way to defendants, who were also brokers, and who had no knowledge that the vendor was not making the sale on its own account. By the terms of the sale the certificate of stock was to be delivered and payment made the day following. Shortly after the sale the vendor notified the exchange that it was insolvent, and the defendants, in accordance with the rules of the exchange, proceeded to close all its contracts with the insolvent firm. They set off the purchase of the shares in question against a like number of shares which they had contracted to sell, paying the difference in price to the receiver in bankruptcy of the insolvent firm. On the morning following the failure the owner called at the office of the defendants and made a formal demand that they take and pay for the stock. This they refused to do, and the owner thereafter assigned the stock and all his right of action against the defendants to the plaintiff, who commenced this action to recover the purchase price.

Held., that the contract for the sale of the stock being executory the announcement of the failure of the vendor was equivalent to a request to defendants to close their contracts, which they did, and hence plaintiff could not thereafter recover.

The defendants were entitled to regard the vendors as the owners until they were notified of the real owners' rights.

PRINCIPAL AND AGENT—*Continued.*

It seems, that plaintiff might have recovered the difference between the price of the stock defendants contracted to purchase and the stock they set off against the claim.

The rights of an undisclosed principal are subject to claims acquired in good faith against the agent; but this rule does not apply where the persons dealing with the agent knew, or are chargeable with knowledge, of the existence of an undisclosed principal. *Kent v. De Coppel*, 589.

5. *Sale defined—factor and broker distinguished—action by factor for damages resulting from discharge—construction of contract—when agent entitled to commissions.* A sale is a contract for the transfer of property from one person to another for a valuable consideration. The thing sold must have an actual or potential existence, and be specific or identified and capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement.

A party under contract to secure orders for and deliver wine in certain territory—delivery being essential to entitle him to his commissions—is a factor, and not a broker, within the ordinary meaning of the terms, and orders taken by him and accepted by his principal, but not filled, are executory agreements and not sales.

Thus, such a factor, in an action for damages because of his discharge, cannot recover commissions on the unfilled orders.

The practical construction given a contract by the parties themselves is of great importance in determining their meaning.

An agent earns his commission when his work is done; if he is a mere broker, when he produces an acceptable customer; if a factor, an agent to obtain and fill orders, when he has made delivery. *Hall v. French-American Wine Co.*, 609.

6. *Action for commissions upon sale of bonds—evidence.* In an action by an agent to recover commissions alleged to have been earned in effecting the sale of bonds, the defendant claimed that plaintiff deceived the purchaser and misrepresented the facts for which defendant had to make settlement. Evidence examined, and held, that plaintiff failed to establish a cause of action. *Ward v. Rainey Pier Co.*, 707.

7. *Broker's action for commissions—corporation—powers—authority of agents—notice.* The plaintiffs in an action against defendant, a corporation, alleged that they had entered into an agreement whereby the defendant agreed to pay them a commission of ten per cent on the transaction, provided they produced a purchaser for defendant's mill and quarry and the personal property connected therewith; that the plaintiffs had performed all of the conditions on their part, and that the defendant had refused to pay the commission. It was not alleged that the defendant was the owner of the property. It appeared upon the trial that the property in question belonged to the president of the corporation personally at the time of the making of the alleged contract, that this was known to the plaintiffs, and that the corporation was not organized to deal in real estate.

Held, that the plaintiffs failed to establish the cause of action alleged, and that, if they made any contract for commissions, they made it with the president of the corporation personally.

It is not within the apparent authority of a manufacturing corporation to sell its plant and machinery.

Thus, the president of such a corporation cannot bind it by an agreement made in behalf of a corporation with brokers to sell his individual property.

It can never be presumed that the agent of a corporation has authority to transact business not authorized by the charter of the corporation.

Persons dealing with corporations are bound to take notice of the limitations upon the powers of the agents of such corporations. *McCorry v. Wiarda & Co.*, 863.

When notice to officer of trust company notice to corporation.

See BILLS AND NOTES, 4.

Broker—action for commissions for securing loan.

See CONTRACT, 11.

Stockbroker—agreement to carry stock.

See CONTRACT, 12.

PRINCIPAL AND AGENT — *Continued.*

Estoppel of owner of stock from denying acts of agent — rights of *bona fide* transferee.

See CORPORATION, 4.

Extension of time to pay insurance premiums.

See INSURANCE, 4.

When sub-agent cannot bind principal by contract of employment.

See MASTER AND SERVANT, 8.

Action against real estate broker — judgment on pleadings.

See PRACTICE, 2.

Pledge of jewel by agent with consent of officer of principal — title of pledgee.

See REPLEVIN.

PRINCIPAL AND SURETY.

See GUARANTY AND SURETYSHIP.

PROCESS.

1. *Service upon corporation — Municipal Court Act construed — service upon sales agent insufficient.* Section 31 of the Municipal Court Act, providing for the service of summons upon a corporation by delivering a copy to its "managing agent" means that such agent shall be a general manager of the affairs of the corporation as distinguished from a mere agent of limited authority.

Hence, service upon a person who, being merely sales agent of a foreign corporation, solicited orders by sample in this State for transmission to his corporation, is not good service upon the corporation. *Meyers v. North American Watch Co.*, 215.

2. *Service upon non-resident plaintiff while attending trial.* A non-resident plaintiff coming into this State as a necessary witness in his own case cannot, within an hour after the trial of his own action and before he has had an opportunity to leave the State, be served with a summons in another action brought by the defendant.

It seems, however, that there may be cases where service may be made upon such non-resident if necessary for the full protection of our own citizens. *Roberts v. Thompson*, 437.

Notice of justification of sureties on undertaking to discharge mechanic's lien — service on non-resident.

See LIEN, 2.

See EXECUTION.

PROVISIONAL REMEDIES.

See ARREST.

See ATTACHMENT.

PUBLIC HEALTH.

1. *Constitutional law — statute authorizing State Commissioner to appoint local health officers — mandamus to compel appointment to fill vacancy.* Where, after a local board of health passed a resolution, pursuant to section 20 of the Public Health Law, as amended by chapter 383 of the Laws of 1903, declaring that a certain person was nominated for appointment by the State Commissioner as village health officer, said section was declared unconstitutional in so far as it vested power in the State Commissioner to appoint and pass upon the competency of municipal health officers, and a statute was enacted providing that the local board of health shall appoint its health officer, such resolution is rendered invalid and a vacancy created, and a peremptory writ of mandamus may issue to the persons composing the local board of health to compel the appointment of a health officer to fill the vacancy. *People ex rel. Lynch v. Pierce*, 286.

2. *Furnishing of coloring matter with purchase of oleomargarine — "coloring matter" defined — constitutional law — police power.* A grocer, who, upon the sale of a quantity of oleomargarine, furnishes the purchaser with a capsule containing coloring matter, violates section 41 of the Agricultural Law, providing that "No person selling any oleaginous substance not made from pure milk or cream of the same as a substitute for butter shall sell, give away or deliver with such substance any coloring matter."

PUBLIC HEALTH — *Continued.*

The words "coloring matter," as used in the statute, mean coloring matter which may give the oleomargarine the appearance of butter.

The statute is a valid exercise of the police power. *People v. Von Kampen*, 887.

PUBLIC OFFICER.

Sheriff — duty to hold funds under execution — liability for acts of deputy.

See ATTORNEY AND CLIENT.

Removal of county superintendent of highways.

See CERTIORARI, 8.

Power of board of supervisors fixing boundary between town and city.

See MUNICIPAL CORPORATION, 1.

Duties of town superintendent of highways.

See NEGLIGENCE, 4.

PUBLIC SERVICE COMMISSION.

Electric railroad — construction of line to carry high tension wires — when not an extension of railroad.

See RAILROAD, 3.

RAILROAD.

1. *Evidence — negligence — negative testimony — failure to ring bell — death of brakeman — proof justifying recovery.* Although both the engineer and fireman of a locomotive which ran over and killed the plaintiff's intestate testify positively that at the time an automatic bell was ringing, the jury may find to the contrary on the negative testimony of witnesses if they were so close to the place of accident at the time that they could have heard the bell if it had been ringing.

Action against a railroad company to recover for the death of a patrolman who while engaged in inspecting a third rail system at a point where the track was curved was run down and killed by the defendant's locomotive. Evidence examined, and held, that a verdict for the plaintiff based on a finding that the defendant was negligent and the decedent free from contributory negligence should be affirmed. *Hintze v. New York Central & H. R. R. Co.*, 217.

2. *Negligence — rear-end collision between trolley car and vehicle — negligence and contributory negligence, when questions for jury.* Action against a railroad company to recover for personal injuries. The plaintiff while driving a wagon at night, on leaving a city and reaching a macadam road which was in bad condition, drove with his wagon wheels between the tracks of the defendant's trolley line, that portion being paved with brick. He testified that he looked back every minute or two and could have seen a car for nearly half a mile, but did not discover one. The defendant's car, without sounding a bell or giving other warning, ran into the plaintiff's wagon from behind at such speed as to kill the horse and injure the plaintiff, the motorman being unable to stop the car until it had proceeded over 100 feet beyond the point of collision.

Held, that the negligence of the defendant and the contributory negligence of the plaintiff were questions for the jury, and that a judgment for the plaintiff should be affirmed.

A person driving upon a street car track who was struck by a car coming from behind at an excessive rate of speed and without warning, cannot be held guilty of contributory negligence as a matter of law because he did not look back oftener than once in every two or three minutes.

It is immaterial that the defendant's motorman claimed to have sounded the gong immediately before the collision, as such warning was not timely and gave no chance for the plaintiff to leave the track. *Miller v. Buffalo & Lake Erie Traction Co.*, 396.

3. *Electric railroad — construction of line to carry high tension current — when such line not extension of railroad — consent of Public Service Commissioners — eminent domain — condemnation of lands necessary to operation of railroad.* If the plan of an electric railroad already in operation to erect poles outside of its right of way for the purpose of carrying

RAILROAD — Continued.

ing high tension wires around a village so as to avoid danger to the inhabitants be regarded as an extension of the railroad, the permission and approval of the Public Service Commissioners is essential and the map thereof must be filed with the Secretary of State.

But the construction of such line bearing the high tension current in such manner as to avoid danger to the inhabitants of a village may be regarded, not as an extension to, but as an addition, accommodation or facility for the railroad necessary to its operation within the meaning of the Railroad Law, and it may condemn lands for such purposes.

On condemnation for the purposes aforesaid it cannot be urged that the railroad should as a condition precedent have obtained permission of the local authorities to lead the electric wires across highways, where the lands sought to be condemned do not adjoin the highways at any point and the plaintiff is the owner in fee of so much of the highway as it seeks to occupy with its line.

It seems, that if such railroad intends in the future unlawfully to use its line to supply electricity to others, it may be restrained from so doing if a proper case be presented. Syracuse, Lake Shore & N. R. R. Co. v. Carrier, 411.

4. *Failure to remove inflammable material from right of way — Forest, Fish and Game Law, section 228 — damages — amount of damages*
Action against a railroad company to recover the penalty prescribed by section 228 of the Forest, Fish and Game Law requiring railroads twice a year to remove inflammable materials from such portions of their rights of way as pass through forest lands or lands subject to fire. The statute provides that the offender shall be liable to a penalty of \$100 for each day that it continues a violation thereof, but fails to state at what times of the year the inflammable material shall be removed.

Held, that although the defendant did not remove inflammable material at all for two years, the maximum penalty recoverable is \$200 and that a verdict for \$32,200 should be reduced to said sum. People v. Long Island Railroad Co., 765.

5. *Negligence — collision at grade crossing — proof raising question for jury — evidence — weather conditions — testimony of district forecaster.*
Action to recover for personal injuries received by the plaintiff who while driving across a railway track was struck by a train. The engineer blew his whistle before the collision, but the question of negligence turned upon whether the signal was timely. Evidence examined, and held, that the questions of the defendant's negligence and the contributory negligence of the plaintiff were properly submitted to the jury.

In such action it is not error to admit for what it is worth testimony by the district forecaster of the United States Weather Bureau based on the bureau records as to the foggy condition of the weather at the time of the accident, although the observations were taken at the weather bureau, there being no objection that the record itself was not put in evidence. The remoteness of the place of observation went merely to the weight of the evidence. *Connors v. Long Island Railroad Co., 880.*

6. *Taxation of right of way for improvement of streets passing thereunder — statute — repeal by implication — constitutional law — equity.*
A railroad company, whose right of way crosses the streets of a village by means of bridges and abutments, is not liable to assessment for the improvement of the village streets as no special benefits inure to its right of way from such improvements.

The provision of the statute (Laws of 1899, chap. 517) under which such improvements were made, that "No abutting or adjoining property shall be exempt from assessment under this act," does not repeal by implication the provision of the Railroad Law (Laws of 1890, chap. 565, § 64) that a highway passing under a railroad shall be maintained and kept in repair by the municipality in which the highway is situated.

Repeals by implication are not favored and will not be presumed unless there is an irreconcilable inconsistency between the two statutes.

Quere, as to the constitutionality of Laws of 1899, chapter 517, providing that no abutting or adjoining property shall be exempt from taxation for street improvements.

RAILROAD—Continued.

A court of equity has jurisdiction to reduce, vacate or enjoin the enforcement of an assessment upon abutting property for street improvements. *N. Y., N. H. & H. R. R. Co. v. Vil. of Port Chester*, 893.

Master and servant — negligence — injury to motorman.
McCue v. Brooklyn Heights R. R. Co., 919.

Interstate commerce — liability of initial carrier for loss.
See CARRIERS.

Action to recover for death.
See DAMAGES.

Malicious prosecution — arrest for theft from freight car.
See MALICIOUS PROSECUTION.

Maintenance of fence across right of way — injunction — adverse user of property devoted to public purpose.
See REAL PROPERTY, 2.

REAL PROPERTY.

1. *Dower — corporation — conveyance of land to officer in trust for corporation — passive trust — action by officer's wife for dower — evidence — minute books of corporation — resolution authorizing conveyance.* Where land of a corporation is conveyed to one of its officers in trust for its benefit, the title is vested in the corporation, the trust being a passive one.

Where in an action by the widow of P. for dower it appears that in 1869, at the time of the consolidation of two railroad corporations, one of them conveyed the land in question in trust for its benefit to P., who was at the time a director or officer in both companies; that the grantee did not retain possession of the deed, and where, notwithstanding the service of the notice, the deed was not produced at the trial, and it appears that after most careful search it could not be found by the defendant, the new company; that it might have been destroyed by the burning of one of defendant's buildings in which similar documents had been stored, and that it was on a list of deeds and papers kept by the defendant's counsel, the defendant may not complain because the court upon rendering judgment against the plaintiff dismissed a counterclaim that the heirs of P. convey to defendant the land, the deed of which to P. had been recorded, for, if there was a cloud upon the title, it was by the act of defendant's predecessor.

The error, if any, in permitting a witness who was secretary, director and counsel of the corporation when it conveyed the land in question to P., to read from its minute book of the election and resignation of officers, of which he had no personal knowledge, is harmless where he testified that he knew that the men took charge of the affairs of the corporation and that he also had business relations with them thereafter, the fair intendment being that P. acted upon resolutions appearing in the book.

The resolution of the corporation authorizing the conveyance of the land in question to P. was admissible in evidence when sufficiently identified, it appearing that his relation to the resolution was such as to make it competent and relevant to the deed taken by him.

Evidence as to the authority given by the then president of the corporation, when P. was not present, to buy the land was also admissible as it was from that transaction that the title of P. arose. *Poppensen v. Poppenhusen*, 807.

2. *Suit to enjoin railroad company from maintaining fence across right of way — adverse user of property devoted to public purpose — deed — effect of restrictions in habendum clause — covenant to build fences affirmative — breach of covenant as ground for prescriptive right.* Where, in a suit to enjoin the defendant, a railroad company, from maintaining a fence recently constructed across a right of way which the plaintiff claims to have acquired by prescription, it appears that during the last fifty years plaintiff and his predecessors and others have reached the highway by walking along the side of defendant's tracks and across the same in front of a station, and that this user has been open, visible, continuous, peaceable, uniform, uninterrupted and with the knowledge of the defendant, the plaintiff's user is not sufficient to create a prescriptive right of

REAL PROPERTY — *Continued.*

way over the defendant's property which is devoted to a public purpose and freely resorted to by the public.

It seems, that the plaintiff's use is permissive rather than adverse, and not such as would constitute notice to the defendant of an adverse claim.

More definite and distinctive acts of adverse user are necessary to establish a right of way over unfenced property appurtenant to a railroad station and commonly and openly frequented by the general public than are required to raise a presumption of a right of way over property devoted solely to private purposes.

A statement in a habendum clause of a deed that property is to be held for railroad purposes does not limit the fee conveyed and, *it seems,* that the grantee may convey the fee.

A covenant to build fences is an affirmative one running with the land.

A breach of such covenant to build fences constitutes a wrongful act and cannot be the foundation for a prescriptive right. *Concklin v. New York Central & H. R. R. Co.*, 739.

Conversion of rents by manager.

Pakas v. Hurley, 909.

Contract agreement to reconvey — assignment of bid at foreclosure sale.

Caporali v. Santangelo, 911.

Contract by religious corporation to convey land — leave of court — specific performance — damages — deposit on contract — equitable lien.

See CORPORATION, 1.

Oral contract to convey land — part performance.

See EQUITY, 2.

Slander of title.

See LIBEL, 1.

Conveyance of part of mortgaged lands — release of remaining lands from lien — marshaling assets.

See MORTGAGE, 4.

Injury to pedestrian by fall on sidewalk — liability of abutting owner.

See NEGLIGENCE, 9.

Condemnation — jurisdiction of commissioners to determine question of title.

See NEW YORK CITY, 1.

Contract to convey land — specific performance — bill of particulars.

See PLEADING, 4.

Broker's action for commissions on sale.

See PRINCIPAL AND AGENT, 7.

Life estate — charge for support of daughter — liability of devisee.

See WILL, 1.

See LANDLORD AND TENANT.

See PARTITION.

RECEIVER.

Receiver of mortgaged premises — marshaling assets — respective rights of purchaser and second mortgagee to rents and profits.

See MORTGAGE, 3.

Supplementary proceedings against remainderman — action against trustee for conversion.

See TRUST, 1.

REFERENCE.

Delivery of report within sixty days — retention by referee pending payment of fees. Where a referee appointed to take and state accounts between partners delivers his report to the attorney for one of the parties within sixty days after the evidence was finally submitted to him, the opposing party cannot have the reference terminated under section 1019 of the Code of Civil Procedure, because the report was allowed to remain in the office of the referee after the expiration of the sixty days, while the

REFERENCE — *Continued.*

attorney for the successful party was arranging with his client for the payment of the referee's fees.

The fact that the referee made a finding of fact after the report was delivered does not show that he had not in fact delivered it.

Where the referee and the attorney for the successful party both swear that the report was delivered in time, and the only evidence to the contrary is the affidavit of defendant's attorney as to his understanding of certain conversations with the referee subsequent to the delivery of the report, a motion to terminate the reference under section 1019 of the Code of Civil Procedure is properly denied. *Winckler v. Winckler*, 250.

RELIGIOUS CORPORATION.

Contract to convey land — leave of court — specific performance.

See CORPORATION, 1.

REPLEVIN.

Action to recover jewel — pledge of jewel by agent with consent of officer of corporation — title of pledgee — corporation — when act of legal entity and act of officer cannot be distinguished — Stock Corporation Law, section 66. Even though an agent given possession of a jewel for the purpose of sale was guilty of larceny in pledging it, yet where, having subsequently redeemed it, he again pledged it with the full knowledge, consent and active participation of the president of the owner, a corporation, the pledgee's possession is good as against the corporation suing in replevin.

As the corporation owning the jewel could only maintain an action of replevin in its own right and as it was bound by the acts of its officer in its line of business, it cannot contend that the act of the officer should be distinguished from that of the corporate entity so as to make the pledgee's title unlawful.

Such pledge is not invalidated by section 66 of the Stock Corporation Law forbidding corporations which have not paid their obligations when due to transfer property to officers in payment of any debt, etc., as the pledge was not made to an officer, but to a third person who advanced money thereon. *Wood v. Simpson*, No. 1, 471.

Action to recover possession of notes — contributory negligence as defense.

See BILLS AND NOTES, 6.

Action to recover possession of stock certificate

See CORPORATION, 4.

REVISED STATUTES.

See STATUTES.

ROAD.

See HIGHWAY.

ROME.

Water works in city of Rome — claim for extra work — proper fund for payment — collusive audit.

See MUNICIPAL CORPORATION, 2.

RULES.

[For table of the General Rules of Practice cited and construed in this volume, see *ante*, p. lxii.]

SALE.

1. *Manufacture of automobile body to comply with specifications — failure to perform — rule of substantial performance inapplicable.* Action to recover the purchase price of an automobile body which the plaintiff was to manufacture according to specifications furnished by the defendant. Evidence examined, and held, that the body as manufactured did not comply with the specifications, so that the plaintiff could not recover.

A contract to manufacture an automobile body pursuant to specifications furnished by the vendee is not governed by the rule of substantial performance obtaining in the case of building contracts. It involves the

SALE — *Continued.*

personal taste of the purchaser and strict compliance is required. *Cole v. Manville*, 43.

2. *Failure to demand delivery — damage — value of stock — erroneous charge.* Where a contract to sell shares of stock named no time for delivery, a demand is necessary in order to put the seller in default.

Where no demand for delivery was made before the stock became valueless through the failure of the corporation, it is error to charge in substance that if the contract was made and there was no delivery the buyer is entitled to recover the price of the stock at the time of the contract.

Moreover, where the stock was not listed on an exchange and there was no open market therefor the amount of damages for the breach of contract of sale is for the jury. *Spencer v. Hardin*, 667.

Agreement to furnish materials to contractor — abandonment of work by contractor — completion by owner — materialman not limited in recovery to contract price.

See CONTRACT, 6.

Action against husband for goods sold wife.

See HUSBAND AND WIFE, 5.

Power of court to relieve purchaser on foreclosure sale from his bid.

See MORTGAGE, 2.

Right of selling agent to receive payment.

See PRINCIPAL AND AGENT, 2.

Insolvency of broker selling stock on exchange — rights of owner — closing contracts with insolvent firm.

See PRINCIPAL AND AGENT, 4.

Definition of "sale" — factor and broker distinguished — action by factor for damages resulting from discharge.

See PRINCIPAL AND AGENT, 5.

Action for commissions upon sale of bonds.

See PRINCIPAL AND AGENT, 6.

SCHOOLS.

Action against non-resident — tuition — facts not showing residence within school district. Action by a board of education of a school district to recover tuition for the defendant's children on the ground that they were non-residents of the district. It appeared that the defendant, who had previously lived in another town and paid tuition for his children as non-residents, had during the period in question rented a house within the school district where he lived through the winter, returning to his house in the other town during the summer. It further appeared that he was assessed in the other town as a resident taxpayer, registered and voted there and held the office of supervisor. On all the evidence, held, that he was not a resident of the school district to which he moved during the winter and was liable for tuition.

It seems, that there may be cases where the voting residence of the father and the school residence of his children are not the same. *Board of Education v. Crill*, 407.

SEPARATION.

Examination of husband before trial as to financial condition.

See DISCOVERY, 8.

Failure to pay costs in former action — stay of proceedings on counterclaim.

See HUSBAND AND WIFE, 6.

SESSION LAWS.

[For table containing all Session Laws cited and construed in this volume, see *ante*, p. lviii.]

SHIPPING.

Insurable interest of owner of vessel.

See INSURANCE, 2.

SLANDER.

Slander of title to real property.
See **LIBEL**, 1.

SPECIFIC PERFORMANCE.

Contract to convey lands — bill of particulars.
See **PLEADING**, 4.

STATUTES.

[For tables of the Session Laws and Statutes cited and construed in this volume, see *ante*, p. lvi *et seq.*]

STAY.

Effect — additional security.
See **ATTACHMENT**.

Action for separation — failure to pay costs in former proceeding.
See **HUSBAND AND WIFE**, 6.

Staying action pending service of bill of particulars.
See **PLEADING**, 4.

STREET.

See **HIGHWAY**.

SUMMARY PROCEEDINGS.

Jurisdiction of court.
See **LANDLORD AND TENANT**, 4.

SUPPLEMENTARY PROCEEDINGS.

See **DEBTOR AND CREDITOR**.

TAX.

1. *Construction of municipal water works — liability of competing company.* A water corporation which originally furnished water to a village will not be granted a decree in equity restraining the enforcement of a tax against it for village water works subsequently constructed and operated in competition, where it appears that the supply of water formerly furnished was inadequate for domestic purposes and furnished no fire protection whatever, while the municipal water works are adequate and have produced a material decrease in fire insurance premiums. *Beauty Spring Water Co. v. Vil. of Lyons Falls*, 418.

2. *Transfer tax — valuation of life estate.* An appraiser in assessing a transfer tax upon property passing under a will should ascertain the value of the estate or interest as of the date of the testator's death.

The statute intends that the tax so far as possible shall be based not upon the value of the property itself but upon the value of the right of succession.

While in determining the value of the right of succession to a life estate the statute authorizes a calculation based upon the tables of mortality, the tables are not applicable where the duration of the estate can be ascertained with certainty, as where the life beneficiary dies before the tax is assessed. *Matter of White*, 428.

Taxation of right of way of railroad for improvement of streets passing thereunder.

See **RAILROAD**, 6.

TITLE.

See **REAL PROPERTY**.

TORT.

See **CONVERSION**.

See **FALSE IMPRISONMENT**.

See **FRAUD**.

See **LIBEL**.

TOWN.

Liability for injury by defective approach to property abutting on highway.

See **NEGLIGENCE**, 4.

Action to recover for personal injuries — notice.
See **NEGLIGENCE**, 10.

TRADE MARK.

Copy calculated to deceive public.
See INJUNCTION.

TRIAL.

1. *Information communicated to juror out of court — misdemeanor vitiates verdict.* A juror who, while going to his home during an adjournment of a trial, receives information from certain witnesses in the case that there had been two previous trials of the same case, one of which resulted in a large verdict for the plaintiff and the second in a disagreement, is guilty of a misdemeanor under section 373 of the Penal Law, and a judgment entered on a verdict in which he participated will be reversed even though the other jurors were not influenced by him. *Johnson v. Riter-Conley Manufacturing Co.*, 548.

2. *Separate trial of issue — liability as partner — evidence — judicial notice.* Where judgments for the plaintiff in an action against the members of an alleged partnership have been reversed after three successive trials owing to difficulty in charging the jury properly as to whether one of the defendants was in fact a partner and for the admission of evidence incompetent against him, unless he was a partner, but competent against other defendants, the court, under the authority of section 967 of the Code of Civil Procedure, may in its discretion grant a separate trial of the issue as to whether the defendant was a partner.

The Appellate Division may act on knowledge based upon the record on former appeals of which it takes judicial notice.

Separate trial of the issue aforesaid should not be denied because the motion was not made until the case had been thrice tried, as the futility of the former trials justified the motion. *Franklin v. Leiter*, 678.

Action on note partial defense — burden of proof.

See BILLS AND NOTES, 8.

Construction of contract — province of court and jury.

See CONTRACT, 14.

Action to recover from estate for services rendered decedent — erroneous charge.

See DECEDENT'S ESTATE, 2.

Erroneous nonsuit — failure to take objection at trial — question for jury.

See NEGLIGENCE, 2.

Negligence — inadvertent discharge of jury — direction to jury to retry after discharge — when no mistrial.

See NEGLIGENCE, 5.

TRUST.

1. *Death of life beneficiary — receiver in supplementary proceedings against remainderman — action against trustee for conversion.* An action at law cannot be maintained against a testamentary trustee upon the death of the life beneficiary by the receiver in proceedings supplementary to execution on judgments against the remainderman, to recover the amount of the trust fund originally received by the trustee.

The death of the life beneficiary does not in and of itself sever the trustee's relation to the trust fund, but he continues as trustee until the amount of the fund and the person to whom it is payable have been judicially determined.

Such judicial determination can be had only after an accounting either in the Surrogate's Court or in a court of equity in a proceeding to which all persons interested in the fund are made parties.

Where the receiver of the remainderman appointed in supplementary proceedings brings an action in conversion against the trustee after demand to recover the whole amount of the fund, setting up the facts in regard thereto, and the defendant answers that he has made no accounting, and that he has not received his expenses or commissions, and that he is liable for the fund only in a proper proceeding to which the remainderman himself is a party, an order granting a motion by plaintiff for judgment on the pleadings will be reversed. *Deering v. Pierce*, 10.

TRUST—Continued.

2. *Conflict of laws—validity of bequest made by resident of this State—bequest for charitable use, when valid—bequest in trust to French theological school—effect of French statute disestablishing institution—when trust does not fail—inability of trustee to take—trust administered by Supreme Court.* The validity of a bequest of personal property located here made by a resident of this State is to be determined by the laws of this State.

A bequest of personal property in trust to be used for free scholarships in an incorporated theological school situated in the Republic of France is a legal bequest for charitable use under the law of this State.

Such bequest does not fail because of the fact that prior to the death of the testatrix the so-called Separation Law of France was passed whereby the beneficiary was disestablished and ceased to be a government institution, if in fact it continued to exist under said act as an independent school of theology maintaining scholarship students.

Neither does the trust fail because of the fact that the foreign institution may not be entitled to take legal title as trustee under the French law, for equity will not allow a trust to fail for want of a trustee.

Under the circumstances the trust fund will be administered by the Supreme Court of this State and the proceeds transmitted to the foreign beneficiary. *Matter of Miller*, 118.

3. *Enforcement of trust—action by assignee of beneficiary—complaint—demurrer.* A suit to enforce a trust can only be brought by a beneficiary, and it must be in equity, unless there has been an accounting and promise to pay, or the equivalent thereof, when an action at law may be brought for the ascertained sum. In the latter case the action may be brought by an assignee of the claim.

A complaint, in an action by an assignee of a beneficiary against his executors and trustees to enforce payment of the income from a trust fund, which alleges that on a certain date the defendants "made a further division of the income" in their hands and distributed the same to the various *cestui que trust* entitled thereto, except that they unlawfully withheld from Hoagland the sum of \$208, is demurrable, because it fails to state that there had been an accounting and promise to pay, or the equivalent thereof, or that the trustees had ascertained and established that on that date the sum of \$208 was due to Hoagland. *Batchis v. Leask*, 718.

Conveyance of land to officer of corporation in trust—passive trust—action by officer's wife for dower.

See REAL PROPERTY, 1.

UNITED STATES.

[For tables of sections of the United States Constitution and Statutes cited and construed in this volume, see *ante*, p. lvi.]

USURY.

Section 814 of Banking Law—defenses.

See CRIME, 8.

VENDOR AND PURCHASER.

Real property—agreement to convey free of incumbrances unless vendee elects to assume liens—effect of failure of vendee to state intentions. Where a vendor of lands agreed to convey by a full covenant deed of warranty free of incumbrances, except that should the vendee on the day of closing title desire to assume any liens, the amount thereof should be deducted from the purchase price, the vendor was entitled to wait until the day of passing title to learn whether the vendee desired to assume existing liens, and where the vendee failed to disclose his intention until that day the vendor was entitled to a reasonable time thereafter in which to remove the incumbrances.

Hence, where neither party claimed default as against the other on the day set for passing title, it is error in an action by the vendee to recover earnest money paid to submit the issue as to whether the vendor was in default. *Schueler v. Dooley*, 814.

Contract by religious corporation to convey land—leave of court—specific performance.

See CORPORATION, 1.

VENDOR AND PURCHASER — *Continued.*

Specific performance — bill of particulars.

See PLEADING, 4.

Broker's action for commissions.

See PRINCIPAL AND AGENT, 7.

VENUE.

When change of venue granted — effect of previous applications.

See CRIME, 1.

WAIVER.

Time of performance of contract.

See CONTRACT, 2.

Communications to physician — privilege.

See DAMAGES.

Waiver by servant of benefits of section 81 of Labor Law.

See MASTER AND SERVANT, 10.

WATER AND WATERCOURSES.

Construction of municipal water works — liability of independent company for tax.

See TAX, 1.

WILL.

1. *Real property — life estate — charge for support of daughter — liability of devisee — evidence — equity — remedy at law.* Where a testator devised lands to his wife for life, "subject, however, to my said wife giving a home to my daughter Rachel, so long as my said daughter desires to remain at home," the acceptance of the devise creates a personal liability on the part of the wife either to furnish the daughter a home or to pay to her the reasonable cost of providing a home for herself.

In an action by the daughter against her mother to recover damages for breach of the condition of the devise, evidence of the income derived from the real estate is immaterial.

The daughter's remedy for breach of the condition is an action at law, but where she brings a suit in equity and defendant does not question the form of the action on the trial the court on appeal will not reverse the judgment on that ground. *Glatner v. Glatner*, 89.

2. *Will construed — gift of printing business — when assets pass under such devise.* A testatrix who died leaving only one descendant, a daughter, and nephews and nieces, devised and bequeathed to the daughter "my printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, office furniture, and equipment of every nature connected with said business." She gave to the daughter the life use of her dwelling house and \$5,000 absolutely, making specific legacies to relatives and friends and leaving the residuary estate to her nephews and nieces.

The printing establishment and its assets, which had come to her from her husband, she kept distinct from the rest of her property so that everything pertaining thereto was readily ascertainable. At her death certain printing contracts were nearly completed which later resulted in substantial profits which were paid to the executors.

Held, that construing the will in the light of the surrounding circumstances the testatrix intended that the bills receivable from the printing establishment and cash on hand should go to her daughter rather than to the collateral relatives, as otherwise the business would be stripped of nearly all its working capital.

Held, further, that under the circumstances the bequest to the daughter of \$5,000 was not intended to furnish working capital for the business. *Matter of Lowe*, 347.

3. *Will construed — gift of residuary estate to designated legatees and children — when legatee and children take collectively.* A testator having given a life use of all his property to his widow directed that, at her death, the residue should be "equally divided between" certain persons named "and my niece" S. "and her six children now living." It was further provided that should any of the above-named legatees die prior to the testator and his wife the property should be equally divided among the liv-

WILL—Continued.

ing legatees. At the time the will was executed and at the death of the testator S. had eight children living instead of six. One of the residuary legatees named died after the testator but before the death of his widow.

Held, that the testator intended to divide his residuary estate into as many parts as there were designated legatees living at the death of his widow and that S. and her children were only entitled to one share collectively. *Matter of Myhill*, 404.

4. *Action to revoke probate—evidence not establishing undue influence or testamentary incapacity—burden of proof—gift to attorney—request by wife that husband provide for her by will—new trial—failure of jury to make special finding—evidence—opinion of experts.* Action under section 2653a of the Code of Civil Procedure to revoke the probate of a will on the ground that the testator lacked testamentary capacity, and that the execution was procured by undue influence. Evidence examined, and *held*, insufficient to justify the submission of the question of undue influence to the jury, and that a finding that the testator lacked testamentary capacity was against the weight of evidence.

The decree of a Surrogate's Court admitting a will to probate is *prima facie* proof of its validity, and in an action to revoke probate under section 2653a of the Code of Civil Procedure the burden is upon the plaintiff to overcome the presumption.

The fact that a testator bequeathed to the attorney who drew the will, and who had been a personal friend for many years, jewelry to the value of \$650 does not of itself show undue influence by the attorney.

The fact that a wife requested her husband to provide for her by will does not show undue influence on her part, for she had a right to induce her husband to make suitable provision for her support.

Where it is impossible to tell whether a verdict revoking the probate of a will was rendered on a finding of undue influence or upon a finding that the testator lacked testamentary capacity, there being no special verdict on those issues, judgment for the plaintiff will be reversed where the court erred in submitting to the jury the first question.

Where proof of the testator's acts and business dealings showed that he had testamentary capacity the opinions of experts based upon hypothetical questions in opposition to such proof scarcely, if at all, raises an issue for the jury. *Pettit v. Pettit*, No. 1, 485.

5. *Executors and trustees—appointment of trust company—effect of merger with other trust company.* Where a will named as executors and trustees two individuals and a certain trust company "and the survivors and successors of them," a trust company into which the company name was merged, pursuant to the Banking Law prior to the death of the testator, is entitled to act as executor and trustee. *Matter of Bergdorf*, 529.

6. *Action to annul probate—evidence not showing undue influence—trial—failure to submit specific questions—failure to object.* Action under section 2653a of the Code of Civil Procedure to annul the probate of a will wherein the executor, leaving no wife or descendants, gave the bulk of his property to charities. Evidence examined, and *held*, insufficient to warrant an order setting aside a verdict for the defendant upon the ground that the will had been procured by undue influence.

Where the court directed the jury to find either (1) that the writing was the will of the testator, or (2) that the writing was not his will, the plaintiff cannot object that a finding that the writing was the testator's will is neither a general nor special verdict, where no request for special findings on specific questions of facts was made at trial. *McFarland v. Sharkey*, 552.

7. *Will construed—bequest of interest in copartnership—rights of legatees as against residuary legatees.* Where a testator in express terms bequeathed to his son "all my interest, right, title and claim in and to, and my property in the copartnership or firm" of which he was a member, he conveyed, not only all his interest in the firm as a member, but all his property rights therein, including cash on hand, outstanding accounts and merchandise; these do not go to the residuary legatees. *Sterling v. Heydenreich*, 850.

WILL — Continued.

8. *Construction — deduction by testator from one share.* A testator, having a wife and three sons, who were his only heirs at law and next of kin, left a will appointing his three sons joint executors and devising to them as such his property to hold in trust during the lifetime of his wife for her sole benefit, and providing: “*Third.* After the death of my wife I direct my executors to sell all of my real estate and personal property * * * and to divide the proceeds * * * equally among my three sons * * *, deducting from the share of my son William E. the sum of One Thousand dollars.” *Held,* that the bequest of the \$1,000 did not lapse, but that the testator intended that after the death of his wife his property should be divided into three equal parts, and the \$1,000 deducted from William’s part be divided equally between the other two sons.

The rule that where the disposition of an aliquot part of a residuary bequest fails, such part passes as undisposed of, does not apply in such a case, because there is a valid bequest of the entire estate.

In construing a will the court seeks the intent of the testator and avoids intestacy, if possible. *Mitchell v. Mitchell*, 897.

WITNESS.

When credibility of witness for jury.

See BILLS AND NOTES, 5.

Communications to physician — privilege.

See DAMAGES.

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